Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

Mukand Aneja
Petitioner,

V.

Triborough Bridge and Tunnel Authority
Respondent(s)

On Petition for A Writ Of Certiorari To
United States Appeal Court Second Circuit

PETITION FOR WRIT OF CERTIORARI

Mukand Aneja -Pro Se
3 Braun Court
Park Ridge, NJ 07656
(201) 573-0286

135 pp

QUESTION(S) PRESENTED

Item No. 1

Background:

Appeal Court accepted U.S. Government postal clerk's affidavit which states that he delivered EEOC certified letter between 7/8/96- 7/12/96 (Appendix C dated June 24, 2002) but court did not consider this documented evidence. Plaintiff has maintained since the first hearing in District Court on April 29, 1997 that he received EEOC determination on 7/8/96 and filed his complaint on 10/7/96 since 90 days falls on Sunday and that One – Day period of time should be equitably tolled.

Question No.1

1a.) Should the Summary Judgment standards which required that if there are material issues of facts in dispute making Summary Judgment inappropriate be ignored?

1b.) Since defendant failed to file motion stating that plaintiff has filed the instant action out of time, as ordered by First D.C. judge on 4/29/97, but filed motion about two years later. Should it be ordered as untimely?

Item No. 2

Background:

TBTA implement FLSA for its work force. TBTA pays compensatory time worked to all its executives & professional employees, including vice-president, finance, engineering, & construction etc. TBTA admits that plaintiff earned unprecedented compensatory time, but did not pay due to Termination in November, otherwise comp time would have been extended in February for future use or payment will be made. District Judge believes and apparently Appeal court agreed that FLSA does not cover TBTA policy on Comp. Time. (Appendix N)

Question No 2

2(a) Is this correct, that if the employee is terminated he should not be paid what he earned?

2(b) If an employee is forced to work in non-professional activities, say 68% in the instant case then why he should not be paid per FLSA overtime rules since TBTA admits per their documents that hours worked to be paid @ 1 ½ time the rate?

Item No. 3

Background:

Regarding section 1981 claim, Appeal Court stated that Aneja produced no probative evidence tending to show that

TBTA's alleged reasons were false or pretextual. Aneja has produced sufficient evidence in his second set of Plaintiff's memorandum of law in opposition to defendant's motion for summary judgment including but not limited to making me work on Saturday, Sunday and Holiday and not other employees. All my employees never complained about me or my work until I was there per their deposition transcript record, Stan Vonasek, TBTA, has made 11 false statements included a few to the Inspector Generals'.

Question No. 3

Is it appropriate that jury's duty shall be assumed by the judge?

LIST OF PARTIES

[x] All Parties appear in the caption of the case on the cover page are as follows

1.) Mukand L. Aneja , Plaintiff- Appellant
2.) Triborough Bridge and Tunnel Authority, Defendant – Appellee

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals at App **1, 3, 7, 18** to the petition and is

[X] Reported at Second Circuit, New York

The opinion of the United States district court appears at App. 25, 30, 32, 50, 52, 94 to the petition and is

[X] Reported at **Southern District of New York**

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 7/12/02, 5/23/02, and 12/7/00.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 12, 2002, and a copy of the order denying rehearing appears at App. 1.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

And is also conferred by U.S.C. 2000(e) – 5(f) and U.S.C. 621 et seq 42 U.S.C. 1981, U.S.C. 626, Civil Rights Act of 1991 (Title VII) and ADEA 1967 as amended and Fair Labor Standard Act of 1938 as amended and 28 U.S.C 1343 (3) and (4) and 29 U.S.C 201. Et seq.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A Plaintiff who brought action for Title VII violations of civil rights must file a charge with U.S. Equal Employment Opportunity Commission (EEOC) within 300 days (Butts vs. City of New York 990 F 2d 1397 1401 (2nd Cir 1993)).

However, U.S. Supreme Court held that a timely EEOC filing is not a jurisdictional prerequisite but is a requirement that is subject of "Waiver, estoppel, and equitable tolling" (Zipes vs. Transworld Airlines Inc. 455 U.S. 385, 392 (1981).

When plaintiff, pro se, has actively pursued judicial remedies by filing defective pleadings during statutory period, the time for filing may be tolled as a matter of "fairness"(Gibson vs. NYC Police Dept. 1998 U.S. Dis Lexis 9246 at P.U.(S.D.N.Y.).

Usually, cases for discrimination rest on cumulative weight of circumstantial evidence.(Rosen vs. Thornburgh 928 F2d 528, 533 (2d Cir 1991)). This has not yet been fully presented to the court.

STATEMENT OF THE CASE

On October 4, 1996, Plaintiff sued the Defendant for age and national origin discrimination, asserting claims under the Age Discrimination in Employment Act (ADEA) , 29 U.S.C. 621 et seq. 29 U.S.C. 626, and 42 U.S.C. & 1981 and Fair Labor Standard Act 29 U.S.C. 201. Plaintiff experienced great difficulty in obtaining interrogatory and depositions from Defendant.

First District Judge Hon. Patterson had to issue show cause notice against TBTA attorney (Gloria Colon) that why she should not be sanctioned and held in contempt of the court on 12/19/97(*See* App. 67) and District Court also ordered defendant on 4/29/97 to file motion by 5/29/97 stating that plaintiff has filed the instant action out of time.(*See* App. 94) Defendant failed to file timely motion as ordered by Hon. District Judge Patterson.

Second U.S. District Court Judge granted Summary Judgment on 11/2/99. (*See* App. 50) Declaring plaintiff claim out- of –time. Plaintiff appealed and U.S. Court of Appeals for Second Circuit affirmed in part and vacated & remanded in part, dated 12/7/00.(*See* App. 25) Same Hon. Judge issued Summary Judgment(on remand, on 5/25/01.(*See* App. 30). U.S. Court of Appeals affirmed District Court judgment on 5/23/02(*See* App. 18). Plaintiff received and submitted new evidence (Affidavit from Postal Clerk stated that he delivered letter on or after 7/8/96) & U.S. Court of Appeals accepted that document (*See* App. 3) but refused hearing (*See* App. 1)).

REASONS FOR GRANTING THE PETITION

U.S. Court of Appeals for Second Circuit has so far departed from the accepted and usual course of Judicial proceedings on Summary Judgment that call for an exercise of this courts supervising power e.g. in this instant case which deals with filling complaint in 90 days. According to summary order of District Appeal Court the reason of the dismissal is "For the reasons described in the transcript" of record and that "Plaintiff has failed to come forward with any sufficient evidence of unlawful discrimination..." (*See* App. 50)

How does the court explain the dismissal on the record? The court asks defendants attorney. But someone has to qualify the document, got to show that there is some procedure of entering this date. All we have is a document that says dismissal and notice of right with a date on it. It does not speak for itself. It needs to be explained" and further to defendants attorney, "The court ... and you don't have the full document and you have no affidavit from your client as to what actually occurred..." and then surprisingly to plaintiff: "I am going to hold that you are out of time" and all this with no facts but rather speculations. (*See* App. 32)

At no point did the court consider to toll the statute of limitations because D.C. did not believe that defendant has proven that the complaint was untimely filed, as it appears from the record.

However, Appeal Court did not verify but that plaintiff signed the complaint on 10/4/96 & went to Prose office on 10/4/96 & not on 10/7/96 (*See* App. 70) as assumed by Appeal Court. Furthermore Appeal court ignored the fact that defendant was ordered on 4/29/96 (*See* App. 94) to file Motion to establish case was filed out of time but failed to follow D.C. order (see Transcript from App. 52)

Furthermore, Appeal Court accepted notarize letter from U.S. Gov't Postal Clerk stating that he delivered EEOC letter between 7/8/96 to 7/12/96. Thus complaint can't be out of time and per summary standard case should have been remanded to D.C. for jury trial, but failed to do so, only Supreme Court has the supervisory power to direct U.S. Court of Appeals for Second Circuit.

The details are provided herewith as follows,

THERE ARE MATERIAL ISSUES OF FACT IN DISPUTE MAKING SUMMARY JUDGMENT INAPPROPRIATE

A court may grant summary Judgment under Fed. R. Civ. P.56© only when "there is no genuine issue as to any material fact and ...the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Where, as here, the nonmovant bears the ultimate burden to prove at trial that the

defendant misinformed Plaintiff (regarding his alleged performance evaluation) see Texas Department of Community Affairs v. Burdine, 450 US. At 253, 101 S. Ct. at 1093, he may defeat the summary judgment motion by procuring sufficient specific facts to establish that there is a genuine issue of material fact for trial. Celotex Corp. v. Catrett. 477 U.S. 317, 322, 106 S. Ct. 2548, 2553, (1, L. Ed. 2d. 265(1986).

In addition, in ruling on a motion for summary judgment, a court must, "resolve all ambiguities and draw all reasonable inferences in favor of the party defending against the motion."

Eastway Construction Corp. v. City of New York. 762 F.2d 243, 249(2d Cir, 1985), cert. denied. Finally, summary judgment is ordinarily inappropriate where intent and state of mind are at issue. Meiri v. Dacon. 759 F.2d at 998; Patrick v. LeFevre, 745 F.2d 153, 159 (2d Cir.1984). See Montana v. First Federal S& L of Rochester. 869 F. 2D 100(2d Cir. 1989).

In this particular case, performance evaluation was conducted fraudulently and was supposed to be kept in the department & reevaluated, but Aneja was terminated as a pretext due to the newly discovered age information in conjunction with his national origin status(Where do we move this too?)

PLAINTIFF'S SUIT IN CONNECTION WITH THIS CHARGE IS TIMELY AND IF IT IS NOT TIMELY THEN THAT ONE-DAY PERIOD OF TIME SHOULD BE EQUITABLY TOLLED.

Plaintiff submits that there is a basis for tolling the statute of limitations. It is undisputed that the ninety day limitation period expired on Sunday, October 7, 1996. (*See* App. 88). Rule 6 (a) of the Federal Rules of Civil Procedure provide in relevant part:

"In computing any period of time prescribed or allowed by these rules by the local rules or any district, by order of court or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or legal holiday... in which event the period runs until the end of the next day which is not one of the aforementioned days."

Thus, it is clear that since Plaintiff received EEOC letter on July 8, 1996 (See App. 7, App. 52 and App. 70) the statute of limitations expired on a Sunday, the statute of limitations does not run until next day, Monday, October 7, 1996. (*See* App. 88). There are three appendices (*See* App. 7, App. 52, & App. 70) submitted, herewith to show that plaintiff received EEOC notice on 7/8/96. U.S. postal clerk affidavit, (*See* App. 7) clearly documents EEOC certified letter received by plaintiff on 7/8/96 or later. Secondly complaint was signed by plaintiff

on 10/4/96 & prose office advised on 10/4/96, it was filed timely and plaintiff has to bring required filing fee on 10/7. Thirdly, First District Judge, Hon. Judge Patterson ordered Defendant to file motion by 5/29/97 (See App. 52 & App. 94) to affirm that Plaintiff filed complaint with in 90 days, but Defendant failed to file such motion. Fourthly, at Summary Judgment hearing, (*See* App. 32), Plaintiff clearly informed second judge, Hon. District Court Judge Hellerstein that Plaintiff received post office notice on 7/5 due to 4th of July weekend; post office did not deliver until July 8, 1996. Hon. Judge assumed without any verification without any verification contrary to summary judgment standard, that Plaintiff received EEOC determined on 7/6/02.

In addition, plaintiff submits that there is basis for an equitable tolling. The 90-day rule should be considered in the nature of a statute of limitations subject to waiver, estoppel or equitable tolling. Johnson v. AL Tech Specialties Steel Corp. 731 F. 2d 143 (2d cir. 1984). In Tolliver v. Sullivan County, 841 F. 2d 41 (2 d cir. 1988), plaintiff had the complaint to the pro se clerk prior to the 90- day limitation period expiring on the notice of right to sue. However, the complaint was not filed until the expiration of 90 days i.e. on 10/7. The court held that as long as the initial complaint was received prior to the 90-day limitation period, the statute should be equitably tolled. Tolliver, supra, at 42. See also, Brown v. Enzyme Development Division of Biddle Sawyer Corp., 780 F. Supp. 1025(S.D.N.Y. 1992). In the instant case, plaintiff went to the pro se office with signed complaint on 10/4/99 and was advised that I filed

timely but had to comeback with appropriate filing fee, which I did on 10/7/96.

In Gonzalex– Aller Balseyro v. GTE Lenkurt, 792 F. 2d 857 (10th Cir. 1983), the plaintiff was advised by the pro se clerk that filing the right to sue letter satisfied the statute and as a result the Court tolled the statute. In Baldwin County Welcome Center v. Brown, 466 U.S. 147(1984), the Court refused to hold that the filing of the rights to sue notice within 90 days tolled the suit filing period, where the plaintiff failed to file an appropriate form for an appointment until 96 days after the receipt of the notice of the right to sue letter.

In the case at bar, like Tolliver, supra, clearly there is a basis to equitable toll the statute for one day since plaintiff's calculation excluded the receipt date, and pro se office agreed, since I had signed complaint dated 10/4/96. In additional to the above, the postal clerk affidavit clearly states that he could not have delivered the letter prior to July 8, 1996(*See* App. 7)

Receipt of EEOC NOTICE -

TBTA disputed that plaintiff did not file complaint within 90 days after receiving EEOC notice. Defendant was told by Hon. Judge Patterson to file motion for dismissal within 30 days of April 29, 1997, but TBTA failed to file such motion (*See* App. 52 & App. 94)

If motion was filed by defendant as ordered by District Court in 1997, Plaintiff would have obtained **exact** date from Post Office and/or EEOC, since Post Office and/or EEOC maintains record only for two years. District court has given unfair advantage to defendant in this case. Since post office and/or EEOC do not maintain record beyond two years after the service, it was not possible for plaintiff to provide additional record showing that he received EEOC determination on July 8, 1996 and not on July 6, 1996 as alleged. Receipt indicated dates of January 6, 1997 vs. July 8, 1996. Furthermore, the Post Office doesn't deliver the next day, so if notice was left to the homeowners' address on July 5, it can't be assumed it was delivered/received on July 6. Plaintiff didn't state that he received EEOC letter on July 6 but it was District Court that assumed & concluded differently. A few sentences of discussion in District Court Appearances (*See* App. 32) are stated verbatim here

" THE COURT: The bottom shows a date of July 6 which is the date of delivery.

MR. HEDIGER: 1997, your honor, which is -----

THE COURT: I presume that's an error.

MR. HEDIGER: Well, one of many, perhaps, your Honor. If they are entitled to a presumption ---

.....

MR.HEDIGER: Judge, the first day is --- assuming

delivery on July 6, and I 'm not admitting that---

THE COURT: Don't fence.

MR. HEDIGER: Judge, I am sorry?

THE COURT: Don't fence. Just give me your facts, not your speculations."

I signed the original complaint on 10/4/96 and pro se Office told me that I filed timely, but had to come back to provide appropriate filing fee which was completed on 10/7/96.

Plaintiff has submitted sufficient evidence in his second set of Plaintiff's memorandum of law in opposition to defendant's Motion for Summary Judgment in addition to 135 Exhibits submitted on 11/30/98.

Stan Vonasek, TBTA has made 11 false statements including a few to Inspector General. How can Court put faith & trust in the evaluation and/or record submitted by Stan Vonasek. TBTA was engaged in Bid Rigging and provided inflated contracts to certain contractors. Only four examples were cited in the Anaya's response to defendant motion for Summary Judgment- 4/26/01. All available in the record under 96 CV 7598. They were Bid Rigging (Exhibits 4&5) plus two

false statements made to Inspector General Office (Exhibit 6 & Exhibit 7 A)[1]. Furthermore, TBTA Deputy Director of Engineering & Design, Mr. G. Sigal, at his deposition, in response to TBTA attorney's question, stated that plaintiff has ideas to save millions of dollars for TBTA. (Exhibit 17 – Aneja's response to defendant motion for Summary Judgment-4/26/01 All available in the record under 96 CV 7598. Submitted herewith shows pretextual and false activities such as showing attendance record be fair and punctuality record to be poor. Messers Vonasek, Lilland & Williams, who signed the termination form stated that in their deposition that the have (& TBTA no reason &/or no record to prove that since plaintiff has been with enormous amount of overtime.

2) U.S. Court of Appeals for Second Circuit has entered decisions in conflict with the decision of other appeals courts i.e. 5th circuit, 7th circuit and 10th circuit in the instant case only Supreme Court can provide direction. The following cases are presented for review.

FLSA requires professional person to perform certain non-professional duties, maybe up to 20% , without any compensation, Appeal Court agreed with District Court that a professional person performing supervisor duty of supervisory construction worker and materials is a professional irrespective of non-professional activity &/or time spent. In the instant case, I spent 68% on non-professional activity.

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[1] Exhibits are listed in Docket No. 01-7768 & 96 Civ 7598 & are not provided herewith.

The above factual statement is similar to **McComb v. Eimco Corp., D.C. Utah 1949, 83 F. Supp. 635.** " Detailing of designs made by engineers, which detailing could be done by one skilled in drafting and with a knowledge of mathematics and which was not performed as an essential part of and necessarily incident to one's own designing, was not exempt work under the definition of professional work contained in regulations employees doing such work were not exempt as being employed in a bona fide professional capacity, during work weeks when their hours of detailing of same nature as that performed by non-exempt employees, exceeded 20 per cent of hours worked in work week by nonexempt employees. Under subsection (a)(1)of this section, so that(a)(1)of this section, so that employees doing such work were not exempt as being employed in a bona fide professional capacity, during work weeks when their hours of detailing of same nature as that performed by non exempt employees, exceeded 20 per cent of hours worked in work week by nonexempt employees." **I worked 68 % on construction monitoring activity of time and materials.**

Similar per **Peperissa v. Coren-Indik, Inc., E.D. Pa. 1969, 298 F. Supp. 34.** "One test for determining whether employee is an executive exempt from coverage of this section is that his primary duty consists of management, he customarily and regularly supervises two or more other employees, he has authority to hire or fire, he regularly exercises discretionary power, he doesn't devote more than

20% of time to activities not managerial in nature and he is compensated on salary basis at rate of not less that $100 per week."

Also other professional employees were not asked to do additional overtime, in direct violation of various Rules & Regulations i.e. all employee(s) must be treated equal, in addition to two other professional person working for me, did not work at all on any Saturday(s), Sunday(s) , Holiday(s) except for me, who was at-will employee having less than one year service & must perform as directed by supervisor. On 10/17/94, I demanded from TBTA additional staffing or authorization for additional comp time and was terminated on 10/18/94.

FLSA section 29 USC 207, required employers to maintain record of hours worked. Defendant maintained this record and had attached with Notice of Motion for Summary Judgment (01-7768), which is dated May 1995. In addition, Defendant also submitted attendance record as with Notice of Motion for Summary Judgment (01-7768) which clearly indicates number of hours, Plaintiff Aneja is entitled to payment @ time and one half hour rate as well as double time hour's rate, which were related to work performed on Sunday/Holiday. Construction workers were paid Overtime & TBTA by its own admission record admits that Aneja is entitled to Overtime payment.

TBTA has comp time policy and paid plaintiff only 80 hrs where as more than 195 hours were not paid per TBTA's own account. These were accrued but not paid.

Comp time policy requires straight time payment for hours accumulated. These hours must be paid since I left employment prior to February, where it is required that all hours above 80 hrs must be used prior to its expiration or management must approve extension for these hours accrued, per 29 USC 207. These hours must be paid, if not paid under 29 USC 213.

Hon District Judge did not wish to review TBTA comp time policy as he believes FLSA does not cover that. (*See* App. 89) Mr. Aneja: I have accumulated hours they did not pay.

The court: All Right. Mr. Aneja, it is my job, as I said before, to decide if you an ability to prove a case under the Fair Labor Standards Act. It's not my job to decide if the Triboro Bridge & Tunnel Authority may have acted unfairly to you. It is not my job to decide if they violated one or more of their policies. It is not my job to decide if there were unwise. I have one limited task: Are the facts and allegations that you presented sufficient to allow you to go to a jury under a claim under the Fair Labor Standards Act?

ADDITIONAL CASES ARE PRESENTED HEREWITH, THE INSTANT CASE

As Plaintiff commenced this action *pro se* and has heretofore opposed Defendant's motion for summary judgment, he is entitled to have his pleadings considered

under "a more lenient standard than that accorded to "formal pleadings drafted by lawyers,.'" Krishendat v. TBTA, 1996 WL 39330(S.D.N.Y. Feb 1, 1996), aff'd 107 F.3d4 (2d Cir.1997)(appearing as Defendant's Exh.42)(quoting Haines v .Kerner, 405 U.S.519,520,reh'g denied, 505 U.S.948(1972). "In assessing materials such as affidavits, exhibits, interrogatory answers, and depositions to determine whether the moving party has satisfied its burden, the court must view the record "in the light most favorable to the party opposing the motion' by resolving 'all ambiguities and draw(ing) all factual inferences in favor of the party against whom summary judgment is sought.'"

Krishendat v. TBTA, 1996 WL 39330 (S.D.N.Y. Feb. 1, 1996), *aff'd* 107 F.3d 4(2d Cir.1997)(quoting Chambers v. TRM Copy Centers Corp., 43 F.3d 29,36(2d Cir.1994)(emphasis supplied). "If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference would be drawn in favor of the moving party, summary judgment is improper." Id. (emphasis supplied).

The Chambers court recognized the inherent difficulty a plaintiff would encounter in marshalling direct evidence to carry plaintiff's burden to prove intentional discrimination by a preponderance of the evidence, and therefore instructed that a court must be mindful of this difficulty in judging any circumstantial evidence. Chambers 43 F. 3d at 37.

Plaintiff has presented a prima facie case of age and national origin discrimination. Plaintiff must establish a prima facie case of age discrimination under ADEA by showing (1) membership in the protected group; (2) qualification for the position; (3) adverse employment action; and, (4) circumstances producing an inference of discrimination, such as replacement by a non-member of protected age group. Razkin v. Wyatt Co., Inc. 125 F. 3d 55,63-64,(2d Cir. 1997); Woroski v. Nashua Corp., 31 F.3d 105,108(2nd Cir 1994) It is not necessary for Plaintiff to prove that his replacement was younger. Woroski v. Nashua Corp., 31 F. 3d 105, 108 (2nd Cir. 1994). Plaintiff may prevail under ADEA without showing that age was the primary motivation for the discharge, upon proof that "age played a motivating role in, or contributed to, the employer's decision." Renz v. Grey Advertising, Inc. 135 F. 3d 217,222(2nd Cir. 1997)

Defendant's Motion for Summary Judgment focuses on the second and fourth elements. Specifically, Defendant argues that Plaintiff was unqualified because of two alleged negative evaluations and alleged complaints, and that there is no evidence of discrimination because (1) the decision to discharge Plaintiff was made by the "same actor," Mr. Vonasek;(2)the alleged number of East Indian employees in the Engineering and Construction Department and the alleged existence of older members of Mr. Vonasek's staff and the Engineering and Construction Department; and, (3) Mr. Vonasek's membership in the protected age class.

The existence of a rational basis for, and the accuracy of, the alleged performance reviews is a genuine issue of material fact which will prevent summary judgment. Plaintiff had not received a copy of the alleged first evaluation and was misled as to the extent to which it would be utilized. The alleged second evaluation was not presented to Plaintiff at the time of evaluation but Plaintiff, acknowledged receipt of same on September 19, 1999 and upon said receipt, Plaintiff registered objections and corrections to the allegations therein, including, importantly, that Mr. Vonasek had complimented Plaintiff as doing a good job." Further, Defendant failed to respect the terms of the evaluation itself by refusing to generate a follow-up appraisal prior to "reconsidering" the termination of employment. Defendant hastened to discharge Plaintiff without completing and presenting the follow-up appraisal and affording Plaintiff the opportunity to object to same and correct any errors. In addition, Plaintiff has testified that the complaints collected by Mr. Vonasek were not presented to Plaintiff or placed in his personnel file, and were manufactured by the process of soliciting same from other individuals who addressed actions by Plaintiff that occurred before the date of the alleged second evaluation and/or subsequent to the termination.

Defendant's view of the "same actor" argument as the "strongest inference" of invidious discrimination is perilous. Plaintiff has averred that Mr. Vonasek was not aware of his age at the time Plaintiff was hired and came to know his age

after much persistence and insistence during Plaintiff's tenure at the TBTA. This situation is somewhat analogous to the facts in Brennan v. Metropolitan Opera Assoc., Inc., 1998 WL 193204 (S.D.N.Y. April 22, 1998 (appearing as Defendant's Exh. 35). The Brennan court found that there was no evidence that the employer/decision-maker actually knew of the employee's age or, unlike the instant case, inquired into the subject of the employee's age. In Brennan, the employer was able to utilize the fact of lack of knowledge to defeat an inference of discriminatory intent, whereas, in this case, Mr. Aneja can utilize Mr. Vonasek's lack of knowledge during the hiring phase to rebut the inference of no discrimination. The line of cases cited by Defendant to support its "same actor" theory and consequent inference carry no weight in the instant case where the decision-maker had no prior knowledge of the discriminatory issue but developed said knowledge subsequent to the hiring of Plaintiff and prior to his discharge. Thus, the policy underpinnings for the "same actor" inference, specifically that, as stated in Lowe v J.B. Transport, Inc., 963 F. 2d 173, 174 (7th Cir.1992), "it is suspect to claim that the same manager who hired a person in the protected age group would have suddenly developed an aversion to older people, has no force and presents no logic where there is knowledge at the time of discharge but not at the time of hiring.

In response to Defendant's statistical argument against the inference of age or national age discrimination, Plaintiff was the only East Indian and the oldest individual

who held the title and carried the responsibilities of Facility Engineer under Stan Vonasek's staff. Further, statistical evidence is not dispositive of the issue of discrimination. De La Cruz v. N.Y. City Human Res. Admin. DSS, 82 F. 3d 16, 23(2nd Cir. 1996).

As to Defendant's argument that Mr. Vonasek was a member of the protected class with regard to ADEA, he is not within the protected class for Plaintiff's national origin discrimination claim.

Defendant's contention that the various remarks directed at Plaintiff do not rise above the level of "stray comments" is not supported by the testimony to date. The stray comments doctrine dismisses "stray" remarks as adequate proof of age discrimination unless said comments are:

(1) age related;
(2) proximate in time to the terminations;
(3) made by an individual with authority over the employment decision at issue; and,
(4) related to the employment decision at issue. Comments that are "vague and remote in time" are insufficient to establish discrimination. In contrast specific comments over a lengthy period of time are sufficient.

Brown v. CSC Logic, Inc., 82 F. 3d 651,655-56(5th Cir. 1996) In the instant case, the statements ascribed to Defendant through its employees relating to Plaintiff's age (directly or by inquiring into same) and making remarks regarding foreign accent, in closed door meetings and one of attendees did admit in his deposition are related to age or national origin, are clearly proximate in time to the terminations as well as the adverse performance appraisals; were issued by decision-maker(s) of the Defendant; and are logically linked to Plaintiff's discharge by their timeliness, harshness and character.

At a minimum, a genuine issue of material fact has been raised to whether the referenced comments are related to the decision-making process. When viewed in the totality of the proffered circumstanced: failure to follow internal procedures, disparate treatment of individuals in Plaintiff's position, deceptively and fraudently manufactured complaints; such comments are unambiguous and clearly directed at Plaintiff and Plaintiff's inherent characteristics which were the subject of the discrimination.

The circumstances producing an inference of discrimination can be proved by direct evidence, statistical evidence, or circumstantial evidence, " all of which is aimed at persuading the trier of fact directly that the more likely reason for plaintiff not being hired was because of his age and that the employer's proffered reason was pretextual and

not worthy of belief." Taggart v. Time, Inc. 924 F. 2d 43, 46 (2nd Cir. 1991).

Defendant cites Plaintiff's allegedly unsatisfactory work performance and relies entirely on same as a legitimate, non-discriminatory reason to rebut Plaintiff's prima facie case. The facts set forth by Mr. Aneja in Plaintiff's Statement of Undisputed Material Facts and Plaintiff's Counterstatements to Defendant's Undisputed Material Facts, (an Appendix that was 2 ½ inches submitted to court -00-7088), discredit and undermine the validity of the two allegedly performance, appraisals preceding Plaintiff's discharge. Primarily, Plaintiff puts the material facts underlying the alleged unsatisfactory appraisals in dispute by (1) averring that Plaintiff had not received any of the complaints allegedly registered against him;(2)demonstrating that he was not guilty of untimeliness as allegedly by Defendant by resorting to his records;(3) demonstrating that Defendant failed to provide proper and/or requisite training to correct any deficiencies in his performance; (4) demonstrating Defendant's failure to treat him in the same or similar manner as his predecessor, Mr. Hines; and,(5) proving that Defendant failed to follow its own procedures regarding performance appraisals, corrective action, and termination.

The ADEA "does not protect merely the older worker who is perfect form the standpoint of his employer, such a worker needs no protection except from irrational

employers... It protects, as a practical matter, the imperfect older worker from being treated worse that the imperfect younger one. Dedyo v. Baker Engineering New York, Inc. 1998 WL 9376. * 9(S.D.N.Y. Jan 13, 1998) (citing Shager v. Upjohn Co., 913 F.2d 398, 403(7th Cir. 1990) (quoting Riordan v. Kempiners, 831 F. 2d 690, 697-698(7th Cir. 1987). "A Plaintiff is not required to prove that his performance was flawless or superior. Rather, he need only demonstrate that he' possesses the basic skills necessary for performance of (the) job." De la Cruz 82 F.3d at 20 (quoting Powell v. Syracuse Univ. , 580 F.2d 1150,1155 (2d Cir.), cert. Denied, 439 U.S. 984, 99 S. Ct. 576,58 L.Ed.2d 656(1978).

Defendant's accusations regarding Plaintiff's work performance center on and target this style (abrasiveness and arrogance) rather than his ability to achieve the results which the position of Facility Engineer demands. His basic skills and understanding of the tasks to be performed are not being squarely challenged by Defendant.

Further, Mr. Aneja's predecessor, Mr. Hines, from whom Plaintiff has testified that he inherited various systematic problems is Caucasian. Mr. Hines was demoted, rather than terminated, for ineffectiveness/incompetence after four years as Facility Engineer to Facility Engineer-General Projects. The new position carried decreased responsibility. Plaintiff was not afforded the option to be demoted nor is

there any evidence that said option was considered by Defendant.

Assuming that Defendant has proffered a legitimate, non-discriminatory reason for discharging the Plaintiff, " Plaintiff resisting summary judgment must raise a genuine issue of material fact concerning whether the employer's proffered reason was pretextual and whether the true reason for the adverse employment decision was more likely than not the illegal discrimination alleged by the plaintiff." Razkin v. Wyatt Co., 125 F. 3d 55, 64 (2nd Cir. 1997). The ultimate issue is whether the evidence is sufficient to raise a jury question on the issue of discrimination against the Plaintiff. Id. Plaintiff may defeat a summary judgment motion by raising any triable issue of fact regarding the element of discrimination.

In Meiri v. Dacon, 759 F, 2d 989, 998(2nd Cir.1985), the court failed to find any evidence offered by Plaintiff that suggested that:

1.) the employer's treatment of the employee differed from that of other employees who were not members of the protected class;
2.) the employer departed from its "general policies" in terminating the employee.; or,
3.) the employer retained non-members of the employee's protected class who exhibited similar behavior.

Other items were included in previous submittals. See Plaintiff's statement of undisputed material facts – two volumes each one and ½ inches thick previously submitted on 11/30/98.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mukund Hreja

Date: 12/3/02

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York on the 12th day of July two thousand two.

Aneja -V.- Triborough Bridge	Docket No. 01-7768

Present:

Hon. Roger J. Miner
Hon. Robert D. Sack
CIRCUIT JUDGES

Hon. Richard N. Berman,*
DISTRICT JUDGE

A petition for panel rehearing having been filed herein by Mukand L. Aneja.

Upon consideration thereof, it is

Ordered that said petition [illegible] and it hereby is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk
By: /s/ [Illegible]
Arthur M. Heller,
Administrative Attorney

*The Honorable Richard M. Berman of the United States District Court for the Southern District of New York sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit with statement of issues. (Local Rule 27(a))
Include brief statement of facts with page references to the moving papers.

Mukand L. Aneja Plaintiff-Appellant -against- Triborough Bridges & Tunnel Authority Defendant-Appellee Use short title	01-7768 & 00-7088 Docket Number **MOTION INFORMATION FORM** Motion for Need leave of the court to file exhibits

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

OPPOSING COUNSEL: *(Name, address and tel. no. of Jaw firm and attorney in charge of case)*

Mukand Aneja Prose
201-573-0286

Has consent of opposing counsel:

A. been sought? [ ]Yes [x]No
B. been obtained? [ ]Yes [x]No

Has service been effected? [ ]Yes [ ]No
Is oral argument desired? [ ]Yes [x]No
(Substantive motions only)

~~Requested return date:~~

~~_____~~

~~*(See Second Circuit Rule 27(b).)*~~

~~Has argument date of appeal been set:~~
~~A. by scheduling order? [ ]Yes [ ]No~~
~~B. by firm date/argument notice? [ ]Yes [ ]No~~
~~C. If yes, enter date:~~ _____

EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL

~~Has request for relief been made below?~~
~~*(See F.R.A.P. Rule 8.)*~~
~~[ ]Yes [ ]No~~

Any previous request for similar relief made to the 2"' Circuit?
[x]Yes [ ]No
See below[*]

~~Would expedited appeal eliminate need for this motion?~~
~~[ ]Yes [ ]No~~
~~If no, explain why not:~~

~~Will the parties agree to maintain the status quo until the motion is heard?~~
~~[ ]Yes [ ]No~~

Judge or agency whose order is being appealed:
District Court

Brief statement of the relief requested:
As per court direction, letter DTD June 11, 2002, Exhibits [illegible] provided with petition for hearing

By: *(Signature of Attorney)*
Signed name must be printed beneath.

/s/[illegible]

Mukand L. Aneja

Date: 6/18/02

Appearing for: *(Name of Party)*

Appellant or Petitioner: [x]Plaintiff [ ]Defendant
Appellee or Respondent: [ ] Plaintiff [ ] Defendant

ORDER

BEFORE: Hon. Roger J. Miner, Hon. Robert D. Sack,
Circuit Judges, Hon. Richard M. Berman*

IT IS HEREBY ORDERED that the motion for leave to file exhibits with petition for rehearing is GRANTED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By:
/s/ [illegible]
Arthur M. Heller
Motions Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit with statement of issues. (Local Rule 27(a))
Include brief statement of facts with page references to the moving papers.

Mukand L. Aneja Plaintiff-Appellant -against- Triborough Bridges & Tunnel Authority Defendant-Appellee Use short title	01-7768 & 00-7088 Docket Number **MOTION INFORMATION FORM** Motion for Petition for reconsideration based on new documented evidence

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

OPPOSING COUNSEL: *(Name, address and tel. no. of Jaw firm and attorney in charge of case)*

Has consent of opposing counsel:

A. been sought? [ ]Yes [x]No

B. been obtained? [ ]Yes [x]No

Has service been effected? [x]Yes [ ]No
Is oral argument desired? [ ]Yes [x]No
(Substantive motions only)

Requested return date:

_____

(See Second Circuit Rule 27(b).)

Has argument date of appeal been set:
See below

A. by scheduling order? [ ]Yes [ ]No
B. by firm date/argument notice? [ ]Yes [ ]No
C. If yes, enter date:_____

EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL

Has request for relief been made below?
(See F.R.A.P. Rule 8.)
[x]Yes [ ]No

Any previous request for similar relief made to the 2"'
Circuit? *See below*
[x]Yes [ ]No

Would expedited appeal eliminate need for this motion?
[ ]Yes [ ]No
If no, explain why not:

Will the parties agree to maintain the status quo
until the motion is heard?
[ ]Yes [ ]No

Judge or agency whose order is being appealed:
District Court

Brief statement of the relief requested:
Postal clerk's affidavit (att.) indicates that EOE determination was received on 7/8/96 & not 7/6/96 as district court assumed. Request time extension to [illegible] document for reconsideration of petition for (illegible]

By: *(Signature of Attorney)*
Signed name must be printed beneath.

/s/[illegible]

Mukand L. Aneja

Date: 6/13/02

Appearing for: *(Name of Party)*

Appellant or Petitioner: [x]Plaintiff [ ]Defendant Appellee or Respondent: [ ] Plaintiff [ ] Defendant

ORDER

BEFORE: Hon. Roger J. Miner, Hon. Robert D. Sack, *Circuit Judges,* Hon. Richard M. Berman*

IT IS HEREBY ORDERED that the motion for leave to file exhibits with petition for rehearing is GRANTED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By:
/s/ [illegible]
Arthur M. Heller
Motions Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit with statement of issues. (Local Rule 27(a))
Include brief statement of facts with page references to the moving papers.

Mukand L. Aneja Plaintiff-Appellant -against- Triborough Bridges & Tunnel Authority Defendant-Appellee Use short title	01-7768 & 00-7088 Docket Number **MOTION INFORMATION FORM** Motion for Need leave of the court to file exhibits

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

OPPOSING COUNSEL: *(Name, address and tel. no. of Jaw firm and attorney in charge of case)*

Has consent of opposing counsel:

A. been sought? [ ]Yes [x]No
B. been obtained? [ ]Yes [x]No

Has service been effected? [x]Yes [ ]No
Is oral argument desired? [ ]Yes [x]No
(Substantive motions only)

Requested return date:

_____

(See Second Circuit Rule 27(b).)

Has argument date of appeal been set: *See Below*[‡]

A. by scheduling order? [ ]Yes [ ]No
B. by firm date/argument notice? [ ]Yes [ ]No
C. If yes, enter date:_____

EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL

Has request for relief been made below?
(See F.R.A.P. Rule 8.)
[ ]Yes [x]No

Any previous request for similar relief made to the 2"' Circuit?
[x]Yes [ ]No

Would expedited appeal eliminate need for this motion?
[ ]Yes [ ]No
If no, explain why not:
Will the parties agree to maintain the status quo
until the motion is heard?
[ ]Yes [ ]No

Judge or agency whose order is being appealed:

Brief statement of the relief requested:
Postal clerk's affidavit (att.) indicates that EEOC determination was received on 7/8/96 & not 7/6/96 as district court assumed. Request time extension to include attached document for [illegible]

By: *(Signature of Attorney)*
Signed name must be printed beneath.

/s/[illegible]
Mukand L. Aneja
Date: 6/13/02

Appearing for: *(Name of Party)*

Appellant or Petitioner: [x]Plaintiff [ ]Defendant
Appellee or Respondent: [ ] Plaintiff [ ] Defendant

ORDER

IT IS HEREBY ORDERED that the motion for leave to file exhibits with petition for rehearing is GRANTED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By:

_____

Hon. Alvin K. Hellerstein
District Judge
United States District Court
Southern District of New York
New York, New York

June 10, 2002

Dear Honorable Judge,

On June 5, 2002, I was asked by Mrs. Ela Aneja, resident of 3 Braun Court, Park Ridge, N.J. 07656, to confirm the exact delivery date of E.E.O.C. Certified letter, Article #22831 8544(copy attached)

I would like to bring to your attention, the following:

My name is Steve Cree and I have been employed by Park Ridge Post Office as a postal carrier since 1982. The Post Office maintains records for only two years. Thus the Post Office cannot provide a copy of any records from the file. However, tracking back to 1996, I can honestly state that July 4th 1996 was a National holiday and I left the delivery notice on Friday, July 5th 1996. Generally, when I leave a delivery notice for certified mail, I do not bring the letter the next day. Sometimes, it may take 3-5 days to re-deliver. When Ela Aneja signed the receipt I noted the delivery date as 1/6/97 by mistake. July 6th 1996 was Saturday of the long Holiday weekend and the post office is opened only between 9 a.m. and 12 p.m.

Hence, based on my regular work routine, I can honestly state that this letter was delivered on the week of July 8th 1996, i.e. between July 8, 1996 and July 12, 1996 and not 1/7/97, as erroneously stated.

I am sorry for any inconvenience this may have caused.

Thanking you,
Sincerely,
/s/ Steve Cree
Mr. Steve Cree

USPS Receipt

Article No: 2 2 8 3 1 8 5 4 4
Today's Date: 7/5/96
Sender's Name: [illegible]

Letter, Certified

Name, address, received by signature: [illegible]

Delivered by: Illegible (1|7|96)
Date:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of May Two thousand and two.

PRESENT:

Hon. Roger S. Miner,
Hon. Robert D. Sack,
Circuit Judges,

Hon.
Richard M. Berman*,
District Judge

MUKAND L. ANEJA,
Plaintiff-Appellant,

-V. -

TRIBORO BRIDGE AND TUNNEL AUTHORITY,
Defendant-Appellate.

No. 01-7768

For Appellant:

Mukand L. ANEJA, *pro Se*
Park Ridge, NJ

For Appellee:

GLORIA E. COLON
(Hoguet, Newman & Regal, LLP), New York, NY.

Appeal from the United States District Court for the Southern District of New York (Alvin K. Hellerstein, *Judge*)

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court, dated May 25, 2001, be, and it hereby is, AFFIRMED.

Mukand L. Aneja, *pro se,* appeals from a judgment of The United States District Court fox the Southern District of New York (Alvin K. Hellerstein, Judge) granting summary

judgment to his former employer, the Triborough Bridge and Tunnel Authority ("TBTA"), on his claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq.

On October 4, 1996, Aneja sued the TBTA for age and national origin discrimination, asserting claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et *seq.*, *42* U.S.C. § 2000e *et seq.* ("Title VII"), 42 U.S.C. § 1981, and the FLSA. Following discovery, TBTA moved for summary judgment. In a decision from the bench, upon which the clerk of the court entered judgment on October 27, 1999, the district court granted TBTA's motion. On December 7, 2000, we affirmed the court's dismissal of Aneja's Title VII, ADEA, and 42 U.S.C. § 1981 claims, but remanded for further proceedings on his FLSA claims because the district court did not address them expressly. *Aneja v. Triborough bridge & Tunnel Auth.*, 242 F.3d 364 (2d Cir. 2000) (unpublished table decision)

On remand, the district court granted the TBTA summary judgment on the FLSA claims on the ground that Aneja worked for the TBTA in a *bona fide* professional capacity and therefore failed to state a claim under the FLSA. *See 29* U.S.C. § 213(a) (1) (exempting from the FLSA's overtime-compensation provisions "any employee employed in a bona fide executive, administrative, or professional capacity") . The court observed that while employed by the TBTA, Aneja (1) earned a salary of $68,000; (2) worked in a field requiring professional knowledge and training, viz., engineering; and (3) exercised discretion and judgment

regularly. Hearing Tr. at 5.

On appeal, Aneja argues (1) that the district court's judgment did not comply with due process; (2) that he was not exempt from the FLSA because (a) under the "duties test," he spent majority of his time performing supervisory tasks rather than engineering work, (b) under the "salary test," he was an at-will employee', and (c) he was performing a public service and lacked the authority to hire, fire, and promote those under his supervision; (3) that the TBTA retaliated against him in violation of the FLSA; and (4) that the TBTA's answer to his amended complaint was time-barred because it failed to address his FLSA claim.

We review *de novo* the district court's grant of summary judgment, construing one evidence in the light most favorable to the nonmoving party. Tenenbaum v. Williams, 193 F. 3d 581, 593 (2nd Cir. 1999), cert. denied, 529 U. S. 1098 (2000). The district court must grant summary judgment if "there is no genuine issue as to material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Matsushita Elec. Indus Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. To defeat summary judgment, the nonmoving party must come forward with specific facts that create a genuine issue for trial, West-Fair

Elec. Contractors v. Aetna Cas. & Sur. Co., 78 F.3d 61, 63 (2d Cir. 1996) (per curiam); conclusory allegations will not suffice, Kulak v. City of New York 88 F.3d 63, 71 (2d. Cir. 1996).

Employees protected by the FLSA's overtime provisions must be compensated at a rate not less than one and one-half times their "regular rate" for each hour above forty in a workweek. 29 U.S.C. § 207(a) (1); see Freeman v. National Broadcasting Co., 80 F. 3d. 78, 82 (2d Cir. 1996). But Congress "expressly exempted persons employed in a bona fide executive, administrative, or professional capacity from the FLSA's overtime requirements."
Id. (quoting 29 U.S.C. § 213(a) (1)). The Code of Federal Regulations defines professional employees as those who receive compensation "of not less than $250 per week," 29 C.F.R. § 541.3(e); whose principal duties involve specialized scientific or other knowledge and training, 29 C.F.R. § 541.3(a) (1); and whose work requires "the consistent exercise of discretion and judgment," 29 C.F.R. § 541.3(e). An employee is paid "on a salary basis," for purposes of the FLSA if he or she "regularly receive pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variation in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a).

Bearing these definitions in mind, we agree that Aneja failed to identify a genuine issue of material fact that suffices to defeat summary judgment. For the reasons stated

by the district court in its oral decision, Aneja worked in a *bona fide* professional capacity for the TBTA. That his work involved supervising others, in addition to engineering tasks, does not alter his status as a professional employee within the meaning of the FLSA. And Aneja's lack of authority to hire, fire, and promote employees does not affect our analysis. The "public service" nature of the work that he performed is likewise irrelevant. Aneja's at-will employment, finally, is not consistent with his being paid "on a salary basis," as defined above; he periodically received paychecks that constituted a portion of his compensation and that did not vary depending on the quality or quantity of the work he performed. See 29 C.F.R. § 541.118 (a).

Aneja's retaliation claim fails because the FLSA's retaliation provision, 29 U.S.C. § 215(a) (3), "limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor." *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 *(2d.* Cir. 1993) Aneja never filed a formal complaint for violations of the ELSA before his termination.

Finally, we see no indication that the district court's judgment did not comply with due process.

For the above reasons, the district court's judgment is hereby **AFFIRMED**.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/ Lucille Carr
Date: 5/23/02

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SDNY/NYNY
96cv7598
Hellerstein

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United Stated Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 7th day of December two thousand.

Present: RICHARD J. CARDAMONE,
ROSEMARY S. POOLER,
ROBERT A. KATZMANN,
Circuit Judges.

MUKAND L. ANEJA,

Plaintiff-Appellant,

-v-

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Defendant-Appellee.

(00-7088)

Appearing for Appellant:

Mukand L. Aneja, Pro Se,
Park Ridge, NJ

Appearing for Appellee:

Brian C. Dunning,
NY, NY

Appeal from the United States District Court for the S.D.N.Y. District of New York (Hellerstein, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED** in part and **VACATED** and **REMANDED** in part.

Mukand L. Aneja. who at the time of filing his complaint was fifty-seven years old and who came to this country from India, sued his former employer, the Triborough Bridge and Tunnel Authority ("TBTA") for age and national origin discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), Title VII, 42 U.S.C. § 1981, and the Fair Labor Standards Act ("FLSA"). In an oral ruling on TBTA's motion for summary judgment, the district court dismissed Aneja's Title VII and ADEA claims as time barred and dismissed his Section 1981 claim because TBTA came forward with a legitimate, non-discriminatory reason for his termination and plaintiff failed to offer proof that this reason was false. The court did not rule explicitly on Aneja's FLSA claim; however the order incorporating the court's oral ruling and the judgment dismissed all of Aneja's claims.

On appeal, Aneja argues that his complaint filed on October 7, 1996, was timely, because.-he did not receive the United States Equal Employment Opportunity Commission's ("EEOC's") right-to-sue letter until July 8, 1996. We reject that contention because Aneja points to no portion of the record demonstrating that the EEOC notice, which apparently was mailed July 1, 1996, did not reach him until July 8, 1996. See Sherlock v. Montefiore Med. Ctr. 84 F.3d 522, 525 (2d Cir. 1996) (discussing presumption that "mailed document is received three days after its mailing"). Indeed, at oral argument below, Aneja argued for a July 6 dale of receipt. Because Aneja received the EEOC notice on or before July 6, 1996, his time to file his complaint expired before October 7,

1996. See 42 U.S.C. § 2000e-5(f)(1). Although Aneja argues that the district court should have considered whether his time to file was equitably tolled, this argument is based on his allegation that a district court clerk's office employee told him he had filed on time. Obviously the district court clerk's statement made on the day that Alicia filed his complaint could not have persuaded him to delay filing. Therefore, equitable tolling is not appropriate.

The district court also correctly dismissed Aneja's Section 1981 claim because he failed to rebut TBTA's substantial showing of a non-discriminatory reason for his discharge. The same person who hired Aneja in February 1994, gave him a negative evaluation in September 1994, and fired him the next month after receiving additional negative feedback from other TBTA managers. Aneja produced no probative evidence tending to show that TBTA's alleged reasons were false or pretextual. Therefore, the district court correctly dismissed his complaint. See Gant v. Wallingford Bd. of Educ. .195 F.3d 134, 149-50 (2d Cir. 1999) (affirming grant of summary judgment in Section 1981 Suit where plaintiffs failed to show that defendants' reasons for transferring African-American student were false or pretextual although they were "open to second-guessing").

However, we must vacate the judgment insofar as it dismissed Aneja's ELSA claim, because the district court did not address that claim.

FOR THE COURT:
ROSEANN B. MACKECHNIE,
Clerk
By:
/s/ Lucille Carr

UNITED STATES DISTRICT COURT
SOUTHERN DISCRICT OF NEW YORK

MUKAND L. ANEJA Plaintiff, -against- TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, Defendant.	**SUMMARY ORDER** 96 Civ. 7598 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

The parties appeared for oral argument on defendant's motion for summary

judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons slated on
the record on May 23, 2001 I grant defendants motion and I dismiss the Complaint in its entirety.

The Clerk of the Court shall mark this matter as closed.

SO ORDERED.

Dated: New York, New York
May 25, 2001

/s/ Alvin K. Hellerstein
ALVIN K.
HELLERSTEIN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MUKAND L. ANEJA, Plaintiff, v. TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, Defendant	96 Civ. 7598 (AKH) October 27, 1999 9:45 a.m.

Before:

HON. ALVIN K. HELLERSTEIN,
District Judge

APPEARANCES

DANIEL D. HEDIGER
Attorney for Plaintiff

HOGUET NEWMAN & REGAL, LLP
Attorneys for Defendant

ANDREW M. DANSICKER

Of counsel

(Case called)

THE COURT: Let me talk to you, Mr. Hediger, first.

MR. HEDIGER: Yes, Judge.

THE COURT: With regard to your claims under the ADEA, for background and for age, how do you get around the 90-day requirement?

MR. HEDIGER: Judge, I submitted to the court a return receipt card from the certified mail that was received by my client and I believe there was a lot of irregularities surrounding the mailing of that and the receipt by my client. Therefore, I don't believe that the defendant is entitled to that presumption of regularity.

Mr. Aneja's notice was sent out two to three days after the TBTA's notice was sent out, generated from the same office. Also, there is an error on the card as to the year, in fact, as well as the date of receipt.

My client apparently received it at his home, his wife had signed for it. He didn't receive it for a couple days later.

That's in his ---

THE COURT: Well, for receipt or for mailing?

MR. HEDIGER: Well, there is a presumption of three days for mailing unless that can be rebutted. I believe we can rebut it by the fact that it was mailed out three days after the agency says that it was sent out. They, of course, relied on the date that theirs was sent out. Of course, ours as I had showed was sent out a couple days later. I believe that's significant, your Honor, to surmount the presumption.

THE COURT: Take me through your papers that make those points.

MR. HEDIGER: Judge, it is on the last page of my submission on September 29th, fourth line down. It describes - - the face of the card indicates that the letter was sent no earlier than July 5 - -

THE COURT: Where do you see that?

MR. HEDIGER: I am on, I believe, page 9 of my submission, it is the third line down. Should be on the signature page.

THE COURT: I have your signature page, fourth line down. That's your statement. But where is the document?

MR. HEDIGER: Judge, that was attached as an

exhibit - -

THE COURT: So let's look at that. Take me through that.

MR. HEDIGER: Yes, Judge.

THE COURT: The column at the left says it is a letter, the column in the middle says it is certified - -

MR. HEDIGER: Correct.

THE COURT: The date is July 5, 1996.

MR. HEDIGER: Correct, which is several days after the date the agency's notice was sent to them which in itself is irregular. Should be sent the same day. Also at the bottom - -

THE COURT: Just --

MR. HEDIGER: Yes, Judge.

THE COURT: The bottom shows a date of July 6 which is the date of delivery.

MR. HEDIGER: 1997, your Honor, which is --

THE COURT: I presume that's an error.

MR. HEDIGER: Well, one of many, perhaps, your Honor. If they are entitled to a presumption - -

THE COURT: Let me speak with Mr. Dansicker. Mr. Dansicker, take me through the proof of mailing.

MR. DANSICKER: Your Honor, the EEOC notice of right to sue letter giving Mr. Aneja 90 days to file his claim was mailed certified mail on July 1st, 1996, and that was attached as Exhibit 13 to our motion for summary judgment mailed to Mr. Aneja.

(Pause)

MR. DANSICKER: I don't think there is any irregularity - -

THE COURT: Just a moment.

MR. DANSICKER: Okay.

THE COURT: Exhibit 13, you are saying?

MR. DANSICKER: Yes, your Honor.

(Pause)

THE COURT: Shows a date of mailing of July 1?

MR. DANSICKER: Correct. I don't think there is any-

THE COURT: Does your affidavit describe how the procedure runs?

MR. DANSICKER: I don't think it describes the procedure per se. I know it was mailed on that date and --

THE COURT: How do we know?

MR. DANSICKER: Well, that's the date that it says on the document showing when it was mailed. I don't have an affidavit from the mailing clerk showing which date it was actually placed in the mail, but it is dated that date, July 1st, and it was --

THE COURT: How do you prove that?

MR. DANSICKER: Well --

THE COURT: How do you prove mailing?

MR. DANSICKER: I think the document speaks for itself. It is a genuine document.

THE COURT: But someone has to qualify the document, got to show that there is some procedure of entering this date. All we have is a document that says dismissal and notice of rights with a date on it. It doesn't speak for itself, it needs to be explained.

MR. DANSICKER: Well, your Honor, I think if we needed to we could get the person at the EEOC who sends out that document to present an affidavit as to what their procedure is that they actually -- when they date it, they put it in the mail.

I think it is irrelevant, your Honor, and I will explain why. The letter from UPS, the receipt that Mr. Aneja has attached that we were looking at earlier is dated July 5, 1996. But if you look at the type of receipt that it is, if you look in the upper left-hand corner, it says: Sorry we missed you, we redeliver for you.

So it is obvious that they had tried to deliver it at an earlier date. Nobody had been home, so they redelivered it on July 5. There is no evidence that there is any kind of failure to follow procedures. We know the –

THE COURT: What about that, Mr. Hediger?

MR. HEDIGER: Judge, I think it cuts the other way, frankly. I believe they went perhaps on July 6. I don't think that was a second delivery date, that was probably the first delivery date.

THE COURT: July 6 was the date of actual delivery. Today's date is a redelivery date.

MR. HEDIGER: I'm not so certain, your Honor, that was quite possibly without - - maybe the court has more knowledge of the postal procedure, I don't presuppose -- than I do.

That seems to tell me that that was a date that it was sent, not the first attempted delivery. That usually is noted elsewhere.

THE COURT: So delivery receipt -- and you don't have the full document and you have no affidavit from your client as to what actually occurred, but it is commonly known that for certified mail the post office makes an effort to deliver, and if delivery can't be effected, a notice is left in the mailbox either providing for a redelivery date or inviting the potential recipient to come to the post office. This is a redelivery receipt.

MR. DANSICKER: Your Honor, it doesn't really matter anyway because even if the court accepts Mr. Aneja's offer here and says okay, it was delivered on July 6, 1996, and we assume the '97 was just a miswriting of the year, he is still not within the 90 days. He is 93 days out. So even if - -

THE COURT: What's the date of filing?

MR. DANSICKER: October 7, 1996, 93 days after July 6, not including July 6.

THE COURT: Okay. So how do you explain that, Mr. Hediger?

MR. HEDIGER: Judge, the first day is - - assuming delivery on July 6, and I'm not admitting that --

THE COURT: Don't fence.

MR. HEDIGER: Judge, I'm sorry?

THE COURT: Don't fence. Just give me your facts, not your speculations.

MR. HEDIGER: Judge, the next day is a Sunday, that's the first day. So now we are down to 92 days.

THE COURT: That's not how it goes. You have that number of days, you count the calendar. So you start counting from the next day and you end on 90 days. Do you have a '96 calendar?

MR. HEDIGER: Judge, not -- I need to consult - -

MR. DANSICKER: I believe there is one as an exhibit, I believe I put one as an exhibit in my motion.

THE COURT: Do you know the number?

(Pause)

MR. DANSICKER: Exhibit 33, although it looks like I may have put the wrong year calendar.

THE COURT: You have a '96 calendar.

MR. DANSICKER: Okay. Good.

MR. HEDIGER: Judge, can you repeat that? I was conferring with my client.

THE COURT: Exhibit 33 is a calendar.
(Pause)

MR. HEDIGER: Judge, may I confer with my client?

THE COURT: Yes.

(Pause)

THE COURT: The last day to file would have been October 7, I think, if I correctly calculate. July 6 plus 90 comes out to October 6 which is a Sunday, if my calculations are correct. Do you want to calculate that?

MR. ANEJA: I did it, your Honor.

MR. HEDIGER: October 6 being a Sunday. And Monday is when it was - -

MR. ANEJA: Delivered.

MR. HEDIGER: On the 7th.

THE COURT: So it was filed on the last day?

MR. HEDIGER: Yes.

THE COURT: If, indeed, it starts counting on the 6th. But it doesn't count on the 6th, it counts from the date of the mailing. What is the exhibit of the notice of mailing, Mr. Dansicker?

MR. DANSICKER: Exhibit 13, your Honor. (Pause)

MR. DANSICKER: I think it is incorrect, your Honor, it should be the following Friday, the 4th. That's 90 days.

THE COURT: How do you get that?

(Pause)

MR. DANSICKER: You start on the 7th of July, that's 25 days in July, 31 days in August, 30 days in September, that's 86 days, the 4th of October would be the 90th day. That's a Friday.

THE COURT: Anyway, it stops on the date of mailing and the mailing did not occur on the 6th, delivery occurred on the 6th. The mailing occurred at least on the 5th. I am going to hold that you are out of time.

MR. HEDIGER: Judge, if I may, the notice that is part of the exhibit recites that it is 90 days from the receipt of

the notice from the EEOC. Still Exhibit 13, your Honor.

THE COURT: Mr. Dansicker?

MR. DANSICKER: Your Honor, it doesn't make a difference. Even if it is from the date of receipt, the 90th on Friday the 4th. This argument is moot. Either way it is not 90 days.

THE COURT: Mr. Hediger?

MR. HEDIGER: I would like to recount. I understand - - I was conferring with my client when Mr. Dansicker came up with 90 days being the Friday, I would like an opportunity to do the math again.

(Pause)

THE COURT: I find that the 90th day following receipt falls on October 4, the lawsuit was not filed within that 90th day, and therefore the Title VII claims are precluded.

MR. HEDIGER: Judge, if I may, I didn't -- wasn't able to calculate so quickly, but it is our position that - - I don't know if there is any substantiation in the record so far that the 7th -- that day should count, July 6 shouldn't count, and arguably we are arguing July 7 shouldn t count. This is a weekend. Ninety days should logically - -

(Pause)

MR. HEDIGER: Judge, is it the case that 90 days from July 7 ends up on October 4 or October 5?

THE COURT: October 4.

MR. HEDIGER: That includes July 7?

THE COURT: Rule 6 tells you what to do. The first day in counting is the 7th and the 90th day is the 4th of October, and the rule requires that you file within 90 days. You are out of time.

All right. That deals with Title VII claims. Next, what causes of action - - Count 1 and then Count 2 - -

MR. HEDIGER: Judge, we still disagree with the court, respectfully. We still feel it falls on a weekend, the 90th day.

THE COURT: The 90th day is the 4th. You have got 25 days in July, 31 days in August, 30 days in September. That gives you 86 days. Four more days after that is October 4, that's the 90th day. You didn't file within the 90th day.

That deals with Count 1 and Count 2. Let's deal with Count 3. Mr. Dansicker, what's your point?

MR. DANSICKER: Your Honor, that leaves Count 3 which is essentially a national origin discrimination claim.

There is really no evidence to substantiate any national origin discrimination here.

The plaintiff was hired despite the fact that numerous non-East Asians were interviewed for the position and were rejected. At the time the plaintiff was hired, he had an accent. That was noted by the person Stan Vonasek who hired him

THE COURT: What's his national origin?

MR. DANSICKER: Mr. Vonasek is Caucasian.

THE COURT: Mr. Aneja?

MR. DANSICKER: Mr. Aneja is East Indian. I don't know the exact country.

THE COURT: All right.

MR. DANSICKER: At the time --

THE COURT: You said he was hired knowing his national origin at the age of 57?

MR. DANSICKER: Correct.

THE COURT: How long after that was he let go?

MR. DANSICKER: Approximately eight months, by the same manager who hired him initially.

THE COURT: And your papers show reasons? The depositions - -

MR. DANSICKER: Absolutely, your Honor. We go into it in great detail.

THE COURT: Mr. Hediger, how do you get around the presumption that comes back to you? It is now your burden to show that there was a firing because of national origin.

MR. HEDIGER: Judge, quite briefly, they didn't follow their internal procedures regarding the discharge. They gave him two write-ups, so to speak. One was never presented to him, the second one wasn't followed through properly because it allowed for a, I will say probationary period, and they didn't allow him the full bit of that probationary period.

Further, they treated his -- my client's predecessor, Mr. Hynes, Thomas Hynes in a completely different manner. He was demoted for -- I will characterize it broadly as similar complaints.

Thirdly, your Honor, these complaints are not in his personnel file, these were as were submitted by Mr. Aneja, solicited by his supervisor subsequent -- many cases, instances after the discharge. These were not a case where there was complaints coming in about his performance and they would record them in his file and confer with him or let him object to it except in that one review.

MR. DANSICKER: Your Honor, if I could just respond to that point.

THE COURT: Yes.

MR. DANSICKER: Before we go ary further, that's just totally untrue. We had numerous depositions testimony that I presented showing the complaints were made repeatedly during the period of time while Mr. Aneja was employed. Within a few months of his employment date he was told that there were numerous complaints about his attitude, his lack of cooperation and his unprofessional behavior.

That was done on July 6, 1994, in an informal performance review that was held with him by his manager. During the next month his manager testified that he received

numerous additional complaints and those are substantiated by the deposition testimony of the people who complained to him. All that is attached to our motion.

In September of '94 Mr. Aneja received an unsatisfactory six-month evaluation, failure to follow procedures, arrogance, abrasiveness, poor interpersonal skills. It is a really --

THE COURT: I hold that the defendant has come forward with evidence showing a nondiscriminatory reason for termination in such a short few months after the hiring, and that the plaintiff has failed to rebut that. Merely showing that different procedures were used for different people, different people were treated in different ways without really getting into the circumstances and details, is not sufficient proof to show that there was a discrimination against a protected person. I therefore hold that summary judgment on the 1981 claim should be granted to the defendant.

Now, that disposes of all the claims, does it not?

MR. DANSICKER: Yes, it does, your Honor. THE COURT: All right. Thank you very much, gentlemen. Motion granted. There will be a short summary order issued, probably by tomorrow, that reflects the findings of fact noted on the record.

MR. HEDIGER: Thank you, Judge.

(Proceedings adjourned)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MURKAND L. ANEJA,

Plaintiff,

-against-

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Defendants.

SUMMARY ORDER
96 Civ. 7598 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

By notice of motion, filed October 10, 1999, Defendant Triborough Bridge and Tunnel Authority move this court for an order granting summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Oral argument was held before me on the motion on Wednesday, October 26, 1999, in Courtroom 14D, 500 Pearl Street, New York, New York, 10007.

I hold as follows, for the reasons described in the transcript of the argument:

Counts one and two of Plaintiff Aneja's complaint, alleging discrimination in violation of Title VII, 42 U.S.C. § 2000(e) et seq., and the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., are barred, since the complaint was filed more than 90 days after receipt of a right to sue

letter from the Equal Employment Opportunity Commission.. See, 42 U.S.C. § 2000(e)-5(f)(1).

On count three, violation of civil rights under 42 U.S.C. § 1981, Defendant has successfully come forward with sufficient evidence of a non-discriminatory reason for firing Plaintiff within a few months after his having been hired, and Plaintiff has failed to come forward with any sufficient evidence of unlawful discrimination. See, Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

For these reasons and the reasons stated on the record, Defendant's motion for summary judgment is granted and the complaint is dismissed.

The Clerk of the Court shall mark this matter as closed.

SO ORDERED.

Dated: New York, New York
October 27, 1999

/s/ [Illegible]
ALVIN K. HELLERSTEIN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MUKAND ANEJA, Plaintiff, v. TRIBOROUGH BRIDGE & TUNNEL AUTHORITY, Defendant.	96 CV 7598 (RPP)

April 29, 1997
9:45 a.m.

Before:

HON. ROBERT P. PATTERSON, JR.,
District Judge

APPEARANCES

MUKAND ANEJA, Plaintiff Pro Se

GLORIA E. COLON
Attorney for Defendant

* * *

(Case called)

(In open court)

THE COURT: This is the first time on?

MR. ANEJA: Yes, your Honor.

MS. COLON: Yes, sir.

THE COURT: Maybe I should ask defendant to tell me how it views the case. What kind of a case is it?

MS. COLON: Your Honor, my name is Gloria E. Colon. I'm counsel for the Triborough Bridge & Tunnel Authority.

We were served with the complaint in this case, by hand, on February 4. I reviewed the complaint and then I called the clerk's office because your name was not indicated on the papers. I wanted to find out to whom this case had been assigned.

THE COURT: Sure.

MS. COLON: I intended to move to dismiss because the notice of right-to-sue letter that was issued by the

U.S. Equal Employment Opportunity Commission gave 90 days within which to file, and that date was October 3. And I was going to move to dismiss because it was untimely.

THE COURT: Let me see. It says here that the complaint was filed on October 7, 1993. Let me look and see. We always have a problem on these pro se cases. Depending on how the plaintiff has proceeded, the complaint can be filed in the pro se office before it is filed in court. And if it is filed in the pro se office, we go by that date. But this does not seem to have a date.

MR. ANEJA: This one, your Honor, yes.

THE COURT: Let me see. He has something he wants to hand up.

(Pause)

THE COURT: The plaintiff has handed me a summons in a civil action which has in the space provided for date the date of October 7, 1996. But it is true that the 7th and '96 are handwritten in, presumably to reflect the actual date which does appear in the court file, as October 7, 1996.

So that is the date of filing.

MS. COLON: Well, as I stated, your Honor, actually, we had received two documents that were affixed. The front was the complaint which had attached to it that

complaint was dated October 4. And the 4 is written in ink. The rest is typed. And with that came an amended complaint. On that, the date is typed in as February 2, 1997.

THE COURT: Yes, I have that amended complaint.

MS. COLON: And both items, as I said, your Honor, were served on February 4, 1997.

THE COURT: Yes.

MS. COLON: And so then I contacted the clerk's office so that I could find out, as I said, to whom the case had been assigned, and I was told that the case had been dismissed without prejudice, that the papers were not properly filed and that the plaintiff had been given two weeks from that date.

THE COURT: Let me see what we have here.

The docket sheet shows that on February 24, I ordered this case to be dismissed without prejudice unless the plaintiff effects service within two weeks of the filing of this order or shows good cause for failure to effect service.

MS. COLON: That's what I was told on the telephone, your Honor.

THE COURT: When was it served?

MS. COLON: It was not served again. The next thing that I received was --

THE COURT: Was it ever served?

MS. COLON: It was originally served February 4, 1997.

THE COURT: Then, you see, I just did not have notice of that.

MS. COLON: But your order came after that.

THE COURT: It did, but there is no showing that there was no return of service before my order so that the Court had no notice of the fact that service had been effected.

MS. COLON: But I did explain that to the clerk.

THE COURT: Maybe you did, but the clerk does not run the court.

MS. COLON: Well, I asked what should I do and I was told that I should wait until I was re-served, to do nothing until I was re-served.

THE COURT: All right. That is what the clerk told you, but here we are today and we have a complaint which was served and an amended complaint. Has the amended complaint been served?

MR. ANEJA: Yes, your Honor.

MS. COLON: They were together. They were affixed.

THE COURT: Together?

MS. COLON: Yes, your Honor.

THE COURT: So now we need to get an answer or a motion.

MS. COLON: Yes, sir.

THE COURT: What do you want to do?

MS. COLON: Well, your statement that the complaint was filed with the Court October 7 makes it still untimely because the notice of right-to-sue letter stated that it was 90 days within receipt. That would have made it October 3.

THE COURT: All right, that raises a question as to whether it is timely, and this does bear a pro se office -- was the filing fee paid in this case?

MR. ANEJA: Yes, your Honor.

THE COURT: Oh. Then I guess I have to talk to the pro se office.

Could I talk to someone in the pro se office, Robert, to see what they have in the way of filing with them?

(Pause)

THE COURT: When, according to your calculation, was the right-to-sue date, Ms. Colon?

MS. COLON: The date of the dismissal of the notice of right-to-sue letter is July 6, 1996. Triborough received it July 3. Presumably he received it at the same time and it's 90 days from receipt, which would mean that he had to bring this action on -- by October 3, 1996.

THE COURT: I see. 30 days has September, April, May and November. All the rest are 31. So there are 31 days in July and August but not in September.

MS. COLON: October 3, yes. Within 90 days of receipt would make it October 3.

THE COURT: Maybe it is October 1.

MR. ANEJA: Your Honor, that was -- the EEOC signed the letter on 7/1/96. It wasn't delivered --

THE COURT: When did you get the letter?

MR. ANEJA: I don't have the paper. I was not prepared to answer. I don't have the paper, but I can find it.

THE COURT: Continue to look and I will continue to try and get the pro se office on the phone.

MR. ANEJA: I did show to them, the pro se office, and they said it was timely.

THE COURT: Excuse me?

MR. ANEJA: Pro se did tell me that I was within the time frame allowed by EEOC.

THE COURT: So the pro se office gets the papers and the date that they get the papers is what this Court relies on, rather than the date of filing, Ms. Colon.

MS. COLON: Thank you, sir.

THE COURT: That is why I am calling. But 90 days from July 3 would be before October 3.

MS. COLON: Actually, yes, sir.

I also was under the impression that the case continued in its state of dismissal because the plaintiff has brought another lawsuit in the U.S. District Court in New Jersey against another former employer, Burns & Rowe. New Jersey is where he resides, and the counsel for Burns & Rowe, for the defendant, informed me that in the course of a recent deposition where the plaintiff was asked if he had another lawsuit pending against another former employer, he said he had brought a lawsuit against the Triborough Bridge & Tunnel Authority but that the case had been dismissed.

MR. ANEJA: That is not a factual statement. We can take a copy of the deposition. I can bring it in. That's not

a factual statement, and it's not relevant.

THE COURT: Any luck on the pro se office?

(Pause)

MS. COLON: Additionally, he has a case pending in Supreme Court of the State of New York, New York County, for the same operative facts.

THE COURT: Based on what?

MS. COLON: Based on --

THE COURT: A claim of what?

MS. COLON: His claim that it was a termination based on age discrimination.

THE COURT: What is this claim, age discrimination?

MS. COLON: Yes.

MR. ANEJA: Age and nationality.

THE COURT: What is the nationality?

MR. ANEJA: Indian.

THE COURT: Indian.

MR. ANEJA: The trouble was not because the Indian, he said you people come from foreign country, you have a problem with English language. We are technical manager and we are not in public relation. TBTA's goal –

THE COURT: Just let me talk to the pro se office a second.

(Pause)

THE COURT: The records of the pro se office show that the complaint was received by them on October 7, 1996, which occurs sometimes when people are not proceeding in forma pauperis; in other words, people decide to file their complaint and pay the fee. Sometimes there is no delay. If there is a problem about payment of the fee, then there's generally some delay while there is approval to proceed in forma pauperis.

MS. COLON: You're saying that the pro se office informed you that he filed the complaint the same date he filed with the Court, October 7?

THE COURT: Yes.

MS. COLON: We would take the same position, that the complaint was not filed timely.

THE COURT: Then you ought to file your motion

papers and see what Mr. Aneja's reply is.

MR. ANEJA: I believe I was served July 8.

THE COURT: Were you served by certified mail?

MR. ANEJA: I don't remember, your Honor. I don't want to mislead the Court. I believe I served October 8, and that's why - -

THE COURT: If you have the certified mail receipt, that would be helpful.

MR. ANEJA: But I believe it -- see, it was signed by someone on July 1. EEOC could not have it issued the same date. It takes time to mail it, and to my recollection it was October 8. But let me check what I can do to bring it, your Honor.

THE COURT: All right. If you want to bring a motion, how soon can you bring it, Ms. Colon?

MS. COLON: I would like to bring it within 30 days, if that's acceptable to your Honor.

THE COURT: No sooner?

MS. COLON: If you must, I will make myself available then.

THE COURT: 30 days is all right.

MR. ANEJA: Your Honor, if I can produce to her the receipt by October 8, motion --

THE COURT: Show it to her and then it would be useless for her to bring it. October 8 or not, you have to do the counting of the 90 days. So October 8 may not be timely. That is up to Ms. Colon.

MR. ANEJA: July 8, July 8. Sure, no problem, your Honor.

THE COURT: All right. Then the motion will be brought by May 29. How long would you care to answer?

MR. ANEJA: Within two weeks, your Honor.

THE COURT: June 12 for responsive papers and June 19 for reply papers. And in view of the pending motion, I will hear the matter very soon after June 19.

MR. ANEJA: Would your Honor, in the spirit of cooperation, if I can produce the paper to them, the motion need not to be filed, right?

THE COURT: Yes. It is up to Ms. Colon. I cannot tell her not to file a motion. Everyone has a right to file motions.

MR. ANEJA: Yes, your Honor.

THE COURT: That is what the rules provide. But obviously she does not want to do work unnecessarily. So if you can provide it for her, then she may not want to proceed with the motion because it is just a waste of her time.

MR. ANEJA: Yes, your Honor.

THE COURT: I better put this down, in view of that, for June 20. I will hear it June 20 at 4 p.m.

MR. ANEJA: 4 p.m.?

THE COURT: Yes.

MR. ANEJA: Thank you, your Honor.

THE COURT: Is that convenient?

MR. ANEJA: Yes, that would be fine.

THE COURT: Then we will have a date no matter what happens.

MR. ANEJA: Yes, your Honor.

THE COURT: If you do not file an answer, you should file a motion. You should file an answer -- I am sorry, June 20 is bad. June 23 at 4 p.m.

MR. ANEJA: Your Honor, can I make a statement

because you were unable to take my statement before.

THE COURT: Oh, yes.

MR. ANEJA: TBTA attorney made a statement to the Court that Burns & Rowe attorney told her that I told them this case was dismissed. This is not a factual statement.

THE COURT: That is all right.

MR. ANEJA: Thank you.

THE COURT: Just for purposes of trying to increase the understanding, that may be what Ms. Colon understood the man to say. The man may have said that. It does not mean that she is not repeating what she heard or what she thought she heard.

MR. ANEJA: I understand, your Honor.

THE COURT: That is one of the problems of communication and one of the problems we have in a lot of court cases, miscommunication between parties.

MS. COLON: Thank you.

MR. ANEJA: Thank you, your Honor.

THE COURT: Misunderstandings, and that is the reason we get into court.

MR. ANEJA: That's the reason I want to make sure the court reporter understands everything I say.

THE COURT: I would not pay any attention anyway, Mr. Aneja.

MR. ANEJA: Thank you.

MS. COLON: Thank you, sir.

* * *

SOUTHERN DISTRICT OF NEW YORK
UNITED STATES DISTRICT COURT

MUKAND L. ANEJA, Plaintiff, - v. - TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, Defendant.	96 Civ. 7598 (RPP) **ORDER**

ROBERT P. PATTERSON, JR., U.S.D.J.

Pro se plaintiff Mukand L. Aneja ("Aneja") has brought to the attention of the Court, in a letter dated December 13, 1997, the apparent failure on the part of counsel for defendant Triborough Bridge and Tunnel Authority, Gloria E. Colon, Esq. ("Colon"), to comply with certain orders of this Court issued during a pre-trial conference held October 24, 1997.

At the October 24" conference, defendant was ordered to comply with certain of the plaintiff's requests for documents. Plaintiff's December 13th letter and the accompanying attachments reflect that defendant's counsel did not comply with a number of the plaintiff's requests as

ordered by the Court on October 24, 1997. As a result, plaintiff has had the expense of purchasing a copy of the transcript of the October 24th" hearing for $352.00 and the further time and expense of bringing to this Court's attention the failures of defendant's counsel.

Colon has written a letter to the Court, dated December 18, 1997, in response to plaintiff's December 13th letter, in which she admits her failure to comply with the Court's orders in at least two instances, but insists on denying her failure to comply in several other instances despite the clear language to the contrary contained in the transcript, which plaintiff has forwarded to the Court and defense counsel. Colon was present at the October 24 hearing and is responsible as an attorney for accurately recording the orders of the Court issued that day. Her failure to do so is especially inexcusable in light of the burden it has placed on a pro se litigant. Therefore, it is hereby

ORDERED that defendant's counsel, Colon, show cause on December 24, 1997 at 9:00 a.m. in Courtroom 24A why she should not be required to reimburse the plaintiff for the expenses he incurred in purchasing the transcript and for his time and expense in obtaining compliance with this Court's orders; it is further

ORDERED that Colon show cause why she should not be sanctioned and held in contempt of Court for causing an unnecessary expenditure of the Court's time arid energy.

IT IS SO ORDERED.

Dated: New York, NY
December 19, 1997

/s/ [illegible]
Robert P. Patterson, Jr.
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MUKAND L. ANEJA, Plaintiff, - v. - TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, Defendant.	SUMMONS IN A CIVIL ACTION 96 Civ. 7598 (RPP) ORDER

YOU ARE HEREBY SUMMONED and required to file with the Cleric of this Court and serve upon

PLAINT1FFS ATTORNEY (name and address)

Pro se
Mukand L. Aneja
3 Braun CT
Park Ridge, NJ 07656

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fall to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Dated: New York, NY
Oct 7, 1996

/s/ [illegible]
CLERK

/s/[Illegible]
By Deputy Clerk

CIVIL COVER SHEET

PLAINTIFFS	DEFENDANTS
Mukand L. Aneja	Triborough Bridges & Tunnels Authority

ATTORNEYS (*Firm Name, Address, And Telephone Number*)

Pro Se 201-307-1050
3 Braun CT.
Park Ridge NJ 07656

ATTORNEYS (*If Known*)

CAUSE OF ACTION (*Cite the U.S. Civil Statue under which you are filing and write a brief statement of cause*)

42 USC 200 et seq and 29 USC 626; age discrimination and natural origin in an employment setting

---

Has this or similar case been previously filed in SDNY at anytime? No

---

NATURE OF SUIT:
CIVIL RIGHTS
442 – Employment

DEMAND: –over- $50,000
JURY DEMAND: YES

ORIGIN: Original Processing
BASIS OF JURSDICTION: Federal Question (*U.S. not a party*)

PLAINTIFF(s) ADDRESS(es) AND COUNTY(ies)
(Calendar Rule 4(A))

Mukand Aneja
3 Braun CT. – Bergen County
Park Ridge, N.J. 07656

DEFENDANT(s) ADDRESS(es) AND COUNTY(ies)
(Calendar Rule 4(a))

Triborough Bridges & Tunnels Authority (TBTA &/or) MTA –Bridges & Tunnels)
10 Columbus Circle
New York, NY 10009

DEFENDANT(s) ADDRESS UNKNOWN

REPRESENTAITON IS HEREBY MADE THAT, AT THIS TIME, I HAVE BEEN UNABLE, WITH REASONABLE DILIGENT TO ACERTAIN THE RESIDENCE ADDRESSES OF THE FOLLOWING DEFENDANTS:

Signature of Attorney of Record

Date: 10/7/96
Receipt# [illegible]

Mukand L. Aneja PRO SE
3 Braun Court
Park Ridge
N.J. 07656
201-307-1050, fax 307-9255

UNITED STATES DISTRICT COURT
DISTRICT OF NEW YORK

MUKAND L. ANEJA, PLAINTIFF -AGAINST- TRIBOROUGH BRDGES AND TUNNELS AUTHORITY DEFENDANT	96 Civ 7598 COMPLAINT AND JURY DEMAND ON ALL CLAIMS FOR RELIEF

Preliminary Statement

1. This is a civil action brought pursuant to the 42 U.S.C. 200 et seq. and 29 U.S.C. 626 et seq.

2. Specifically, plaintiff alleges that he has been the victim of discriminatory terms and conditions of employment, and terminated because of his age and national origin.

Jurisdiction

3. Jurisdiction is conferred upon this court by 28 U.S.C. 1343 and (4) and U.S.C. 2000e-5(f)(1) and 29 U.S.C. 621 et seq. and specifically U.S.C. 626.

4. Within 300 days of the last act of discrimination complained of herein, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC").

5. This action is filed within 90 days of the date of plaintiff's receipt of a Notice of Right to Sue from the EEOC and after sixty (60) days since the filing of the EEOC charge.

The Parties

6. Plaintiff, MUKAND ANEJA, is Indian and resides at 3 Braun Court, Park Ridge. New Jersey 07656.

7. Defendant, TRIBOROUGH BRIDGE & TUNNEL AUTHORITY (TBTA), is located at 10 Columbus Circle New York, N.Y. 10009.

Factual Allegations

8. Defendant is an employer as defined by title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967.

9. Plaintiff Aneja is Indian (57 years old) and was employed as a Facility Engineer with defendant from Feb. 22, 1994 to Nov. 2, 1994.

10. Defendant TBTA employs over twenty individuals and is an employer within the meaning of Title VII or the Civil Rights Act of 1964 as amended by the Civil Rights Act of 1991 and the ADEA.

11. In June 1994, during a staff meeting, my supervisor persisted three to four times to ask me the year of my birth. When I finally told me it was 1937, he responded "I hire all kinds of people." THAT WAS THE TURNING POINT.

12. On or about July 1994, my Supervisor and I had a conflict regarding the awarding change orders, which means giving additional moneys to a contractor. My Supervisor forced m to favor certain contractors by giving them additional work and over inflating their contract price. This was a continuing problem even at the time of my termination.

13. On Sept. 19, 1994 my Supervisor stated that we (technical and scheduling staff) have foreign accent and is creating problem in dealing with certain contractors. This is not factual.

14. On Sept. 19, 1994 my Supervisor stated that I w foreign born and had problem in English. Hence, he had to

correct my Status Reports. This is not factual.

15. On Sept. 29, 1994 my Supervisor stated that I stutter and that affected my job performance. This is not factual.

16. TBTA MISSION AND OBJECTIVES were not followed. No TRAINING was provided.

FIRST CLAIM FOR RELIEF

17. Plaintiff herewith realleges and incorporates by reference paragraphs "1" through "17" of this complaint.

18. Because of the actions and inactions of the defendant and as a proximate cause thereof, plaintiff has been and continued to be deprived of his rights to equal employment opportunity under Title VII of the Civil Rights Act of 1991.

SECOND CLAIM FOR RELIEF

19. Plaintiff herewith realleges and incorporates by reference paragraphs 1" through "18" of this complaint.

20. As a result o the willful activities of the defendant. plaintiff has been deprived of employment opportunities in violation of the Age Discrimination in Employment Act of 1967 as amended and the Fair Labor Standards Act of 1938 as amended.

THIRD CLAIM FOR RELIEF

21. Plaintiff herewith realleges and incorporates by references paragraphs 1" through "20" of this complaint.

22. By reason of the action and inaction of the Defendant and as a proximate cause thereof, plaintiff has been and continues to be deprived of his rights pursuant to 42 U.S.C. 1981 as amended by the Civil Rights Act of 1991.

PRAYER FOR RELIEF

Plaintiff requests that the Court enter judgment for the First and Second Claims for Relief as follows:

1. An injunction directing the reinstatement of plaintiff;

2. an order directing defendants to take such affirmative action as necessary to insure compliance with Title VII of the Civil Rights Act of 1964;

23. that plaintiff be awarded double his back pay and front pay he would have earned, together with related monetary benefits had he not been unlawfully terminated.

4. compensatory damages;

5. punitive damages;

6. reasonable attorney's fees; and

7. such other and further relief as may be necessary to put plaintiff in the position he would have been in but for the acts of defendants complained of herein.

PLAINTIFF DEMANDS A TRIAL BY JURY

Dated: New York, New York
October 4, 1996

/s/ [illegible]
Mukand L. Aneja PRO SE
3 Braun Court
Park Ridge
N.J. 07656
201-307-1050, fax 307 9255

Mukand L. Aneja PRO SE
3 Braun Court
Park Ridge
NJ 07656
201-307-1050, fax 307 9255

96 Civ 7598

UNITED STATES DISTRICT COURT
DISTRICT OF NEW YORK

MUKAND L. ANEJA,
PLAINTIFF

-AGAINST-

TRIBOROUGH BRIDGES AND TUNNELS AUTHORITY
DEFENDANT

"AMENDED COMPLAIN T" AND JURY DEMAND ON ALL CLAIMS FOR RELIEF

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1. This is a civil action brought pursuant to the 42 U.S.C. 2000e 29 U.S.C. 626 et seq.

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3. Jurisdiction is conferred upon this court by 28 U.S.C. 1343(3 and (4) and U.S.C. 2000e-5(f)(1) and 29 U.S.C. 621 et seq and specifically 2 U.S.C. 626 et seq.

4. Within 300 days of the last act of discrimination complained of herein, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC").

5. This action is filed within 90 days of the date of plaintiff's receipt of a Notice of Right to Sue from the EEOC and after sixty (60) days since the filing of the EEOC charge.

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11. In June 1994 , during a staff meeting, my supervisor persisted three to four times to ask me the year of my birth. When I finally told me it was 1937, he responded "I hire all kinds of people."

12. On or about July 1994, my Supervisor and I had a conflict regarding the awarding change orders, which means giving additional moneys to a contractor. My Supervisor forced me to favor certain contractors by giving them additional work and over inflating their contract price. This was a continuing problem even at the time of my termination.

13. On Sept. 19, 1994 my Supervisor stated in a meeting attended by Messieurs Gadi Amit and Nick Popescu that we have foreign accent and is creating problem in dealing with certain contractors.

14. On Sept. 19, 1994 my Supervisor stated that I

was foreign born and had problem in English. Hence, he had to correct my Monthly Status Reports.

15. On Sept. 29, 1994 my Supervisor stated that I stutter and that affected my job performance.

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2. an order directing defendants to take such affirmative action as necessary to insure compliance with Title VII of the Civil Rights Act of 1964.

3. that plaintiff be awarded double his back pay and front pay he would have earned , together with related monetary benefits had he not been unlawfully terminated.

4. compensatory damages;

5. punitive damages;

6. reasonable attorney's fees; and

7. such other and further relief as may be necessary to put plaintiff in the position he would have been in but for the acts of defendants complained of herein.

PLAINTIFF DEMANDS A TRIAL BY JURY

dated: New York, New York
February 02, 1997

/s/ Mukand Aneja

Mukand L. Aneja PRO SE
3 Braun Court
Park Ridge
NJ. 07656
201-307-1050, fax 307-9255

TRIBOROUGH BRIDGE AND TUNNEL AUTHORIIY
TERMINATION FORM

EMPLOYEE INFO:
Last Name: Aneja
First Name: Mukand

Social Security Number: 506-64-8936
Effective Date: 11/2/94

GENERAL INFORMATION:
Last Day Worked: 10/19/94
Attendance Record: Fair
Punctuality Record: Poor
[illegible] Card Returned: Yes
I.D. Card Number: 7641
Special Tickets Returned: N/A
Other TBTA Property Returned? Yes
Given the opportunity, would you rehire this individual? No

SPECIFIC REASONS FOR TERMINATION:
See attached documentation

APPROVALS

Manager [Illegible]
Department Head [illegible]
Director of Personnel [illegible]

HR USE ONLY

Appendix -L

EQUITABLE TOLLING

Supreme Court (455 US 385,392(1981)) noted that the complained must be filed within 90 days or additional time to be tolled.

[Calendar: July 1996 – December 1996]

1) Rec'd July 8th, Filed Oct 6 – 90 Day,
Oct 6 Sunday
Oct 7 – Filed
one-day tolled

2) Rec'd July 8th, Filed Oct 4 – 88 Day – Per Pro Se
On Oct 4/96

3) US Govt. Postal Clerk Notarize Letter Stats July 8th Delivery – *See* App. 7.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEJKAND ANEJA, Plaintiff, v. TRIBOROUGH BRIDGE & TUNNEL AUTHORITY, Defendant.	96 Civil 7598 (AKH)

May 23, 2001
4:15 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,
District Judge

APPEARANCES

MUKAND ANEJA, Pro Se
3 Braun Court
Park Ridge, New Jersey

HOGUET NEWMAN & REGAL

Attorneys for Defendant
10 East 40th Street
New York, New York
MELISSA L. WEISS, ESQ.,
Of counsel

---

* * *

the bid and how you successfully did the work.

This is professional work at a very high level, Mr. Aneja.

MR. ANEJA: Your Honor, they did not follow my recommendation. They give the bids to somebody else. That's why they gave me this. So in this country, we are in the United States of America, where justice prevails, at least in your court, that we are not making up the story, these are the facts.

THE COURT: Mr. Aneja, whether they followed your advise or they didn't, the question is the kind of work and responsibilities you had.

I am persuaded, Mr. Aneja -- you may disagree with me. It's my job to make decisions --

MR. ANEJA: Before you make the final decision, let me bring to your attention, your Honor, 80 hours, your

Honor said the top limit was compensatory time was 80 hours. That's not a fact. The facts are the person can accommodate, even the chief engineer and the chief financial officer can accommodate as needed, but by end of February he must give in writing to the president of the company that he has extended this, if no action is taken he will automatically grant the extension. Only when a person leaves voluntarily and then - -and you are - -

THE COURT: Mr. Aneja, if you want the reporter to take down what you say, you have to speak slowly. I am not hurrying you.

MR. ANEJA: Okay.

The policy says that any person who work more than 80 hours compensated time, which was earned but not paid, are not reported, that is allowed. You can accommodate as many, as many, $200, $300, what is needed, but you must use it. However, if the person was fired, there is no limitation, he must be paid. That is definitely an issue in this TBTA policy.

I have accumulated hours they did not pay.

THE COURT: All right. Mr. Aneja, it is my job, as I said before, to decide if you have an ability to prove a case under the Fair Labor Standards Act. It's not my job to decide if the Triboro Bridge & Tunnel Authority may have acted unfairly to you. It's not my job to decide if they violated one

or more of their policies. It's not my job to decide if they were unwise. I have one limited task:

Are the facts and allegations that you presented sufficient to allow you to go to a jury under a claim under the Fair Labor Standards Act?

I hold that you have not shown a claim and that there is no triable issue of fact and your case must be dismissed. And I do that for the reasons I said before, that the three-prong test set out by the regulations and by the decision I cited of the Second Circuit show me that you are not able to state a case and that no triable issue exists. The arguments that you make do not, in my judgment, show a triable issue of fact.

MR. ANEJA: Your Honor, is TBTA following FLSA rules?

THE COURT: I can only decide the way I did.

MR. ANEJA: No, by answering the question, what procedure they are following to show this is a public agency following FLSA rule? They have only policy, their own policy comply with the FLSA rules, and that policy they have violated. They have not paid beyond the 80 hour accrued time, your Honor.

I respect your judgment, your Honor. Whatever you decide. You are the judge.

THE COURT: Listen, Mr. Aneja, I am not infallible. You have already proven that I have made a mistake and maybe you will again. But I can only decide the way I see it and the way I see it is how I decide it.

Thank you have very much.

MR. ANEJA: Thank you very much.

MS. WEISS: Thank you, your Honor.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Aneja Plaintiff(s), -against- Triborough Bridges Defendant(s)	96CV7598 (RPP) SCHEDULING ORDER

PATTERSON, D.J.

1. This action is referred to Magistrate Judge _____ for _____ after initial case management conference.

2. This action is referred for mediation: ____Yes ____No.

3. Amend the pleadings by _____

4. Medical Authorizations by

5. Experts' reports to be served by _____

6. Experts' depositions to be completed by _____

7. All discovery to be completed by

8. Dispositive Motions by 5/29/97, Answer by 6/12/97
Reply by 6/19/97, [Illegible]

9. Pretrial order to be filed by _____

10. Settlement conference with parties & counsel on _____

11. Pretrial conference scheduled for _____ at _____

12. Trial date scheduled for

Dated: New York, New York
April 29, 1997

SO ORDERED.
/s/Illegible
Robert P. Patterson, Jr.
U.S.D.J.

Supreme Court, U.S.
FILED
FEB 10 2003
OFFICE OF THE CLERK

No. 02-880

IN THE

Supreme Court of the United States

MUKAND ANEJA,

Petitioner,

v.

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

LAURA B. HOGUET
Counsel of Record
DORA L. IRIZARRY
JOYCE E. LEVOWITZ
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STATEMENT OF THE CASE

The Triborough Bridge and Tunnel Authority ("TBTA"), the Respondent herein, hired the Petitioner, Mukand Aneja, in February 1994 and discharged him for poor performance in November 1994. He filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC") which dismissed his charge after an investigation. On July 1, 1996, the EEOC issued and mailed to Petitioner by certified mail a Notice of Suit Rights ("right-to-sue letter"). Petitioner received the letter on or before July 6, 1996. Ninety-three days later, on October 7, 1996, plaintiff filed a *pro se* complaint in the United States District Court for the Southern District of New York alleging violations of 42 U.S.C. § 2000(e), *et seq.* (Title VII), the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, and 42 U.S.C. § 1981. Neither the original complaint nor the amended complaint subsequently filed by Petitioner contained a claim of violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219.

Following discovery, Respondent moved for summary judgment. The District Court, by a summary order entered on October 27, 1999, granted Respondent's motion for summary judgment and dismissed the complaint in its entirety. The Court held that Petitioner's Title VII and ADEA claims were time-barred because Petitioner had filed his complaint more than 90 days after he had received the right-to-sue letter. As to the § 1981 civil rights claims, the Court found that Petitioner had failed to show that Respondent's reasons for discharging Petitioner were false or pretextual. Pet. App. 50-51.[1]

---

1. References to documents contained in the Appendix to the Petition for a Writ of Certiorari shall be referred to herein as "Pet. App."

On the appeal from the District Court's judgment, the Petitioner argued that his complaint filed on October 7, 1996 was timely because he received the EEOC's right-to-sue letter on July 8, 1996. By a summary order dated December 7, 2000, the Second Circuit Court of Appeals rejected Petitioner's contention because evidence received by, and Petitioner's position in, the District Court established that the right-to-sue letter had been mailed to Petitioner on July 1, 1996 and had been received by him on July 6, 1996. Accordingly, his time to file the complaint had expired before October 7, 1996. The Circuit Court also considered and rejected Petitioner's argument that the District Court should have considered whether his time to file was equitably tolled based on his allegation that an employee of the District Court clerk's office told him that he had filed on time. The Circuit Court held that equitable tolling was not appropriate because the clerk's statement, made the day that Petitioner filed his complaint, would not have persuaded him to delay filing. Pet. App. 26-29.

The Circuit Court further held that the District Court properly had dismissed Petitioner's § 1981 claim because he failed to rebut Respondent's "*substantial* showing of a non-discriminatory reason for his discharge." *Id.* (emphasis added). The Court affirmed the District Court's findings that the same person who hired Petitioner in February 1994 gave him a negative evaluation seven months later in September and then fired him the following month upon receiving additional negative reports from other managers at the TBTA, and that Petitioner had failed to show that Respondent's alleged reasons for discharging him were false or pretextual.

However, although Petitioner had not raised any claim of FLSA violations in either his original or amended complaint or on appeal from the District Court's judgment, the Circuit Court raised the issue that Petitioner may have asserted a claim of violations of the FLSA before the District Court which had not been addressed. Accordingly, it vacated the District Court's judgment to the extent that it dismissed Petitioner's potential FLSA claim and remanded the matter for further proceedings. *Id.* Respondent's petition for a rehearing on the Circuit Court's FLSA ruling was denied.

On remand, the District Court granted Respondent's motion for summary judgment, holding that Petitioner worked for TBTA in a *bona fide* professional capacity and, thus, was exempt from the overtime payment requirements of the FLSA. The District Court held that Petitioner, while employed by TBTA: (a) earned an annual salary of $68,000; (b) worked as an engineer, a field requiring professional knowledge and training; and (c) exercised discretion and judgment regularly.

On appeal, Petitioner argued that he had been denied due process in the District Court and that he was not exempt from the FLSA because: (a) under the "duties test", he spent a majority of his time performing supervisory tasks rather than engineering work; (b) under the "salary test", he was an "at-will" employee; and (c) he was performing a public service and did not have the authority to fire, hire, and promote those whom he supervised. Petitioner also argued that Respondent retaliated against him in violation of the FLSA and that Respondent's reply to his amended complaint was time-barred because it failed to address his FLSA claim.

By a summary order dated May 23, 2002, the Second Circuit Court of Appeals reviewed, *de novo*, the judgment of the District Court. Pet. App. 19-24. Adopting the reasons set forth by the District Court, the Court of Appeals held that Petitioner was an "exempt" employee working for Respondent in a professional capacity within the FLSA's framework. The Court rejected as irrelevant Petitioner's claim that the FLSA applied to him because he performed a public service and he did not have the ability to hire, fire or promote those whom he supervised. It also found that Petitioner was paid "on a salary basis" since he periodically received a paycheck that constituted a portion of his compensation which did not vary according to the quality or quantity of work he performed.

The Court of Appeals also rejected Petitioner's retaliation claim because it failed to satisfy the requirements of the FLSA's retaliation provisions. The Court further noted that Petitioner never filed a formal complaint for violations of the FLSA before his termination. Finally, the Court rejected Petitioner's claim of denial of due process, finding no indication that the District Court's judgment did not comply with due process.

Petitioner moved for rehearing before the Second Circuit Court of Appeals, which was denied on July 12, 2002. Pet. App. 1-2. Subsequent to the Second Circuit's denial, Petitioner filed the instant petition for a writ of certiorari on December 7, 2002.

SUMMARY OF ARGUMENT

The petition should be denied because the Court of Appeals properly applied the correct standards and legal principles enunciated by statutes, regulations, and the case law of this Court and other federal circuit courts. Its decisions do not conflict with any decision of this Court or any other Court of Appeals; accordingly, review by this Court is not warranted. *See Braxton v. United States*, 500 U.S. 344, 347-48 (1991) (principal purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals and state courts concerning meaning of provisions of federal law). Petitioner's primary ground in support of his application is that the Court of Appeals erred in its findings of fact or in upholding the District Court's findings of fact. Only in the rarest of circumstances, not present here, is a petition for a writ of certiorari granted due to error in making findings of fact, or the alleged misapplication of a properly stated rule of law. U.S. Sup. Ct. Rule 10.

The decisions below were correct and should not be disturbed by this Court because:

1. The Court of Appeals properly affirmed the District Court's determination that Petitioner's Title VII and ADEA claims were time-barred because Petitioner filed his complaint more than 90 days after his receipt of a right-to-sue letter from the EEOC, and factors warranting the equitable tolling of the limitations period were not present.

2. Similarly, the Court of Appeals correctly affirmed the District Court's dismissal of Petitioner's 42 U.S.C. § 1981 claim because Petitioner failed to rebut Respondent's

substantial showing of a non-discriminatory reason for his discharge. Under the framework set forth in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *Texas Dep't. of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981); and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), Petitioner had the burden of producing sufficient evidence of unlawful discrimination, but failed to do so.

3. The Court of Appeals also properly determined that Petitioner's FLSA claim was correctly dismissed by the District Court because Petitioner was an exempt employee under the FLSA standards. The Court of Appeals reviewed Petitioner's FLSA claim *de novo* and concluded that Petitioner worked in "a *bona fide* professional capacity" as a Facility Engineer for Respondent.

REASONS FOR DENYING THE PETITION

1. Petitioner's Title VII and Age Discrimination Claims Were Time-Barred

The Court of Appeals properly affirmed the District Court's determination that Petitioner's claims under Title VII and ADEA were time-barred because Petitioner filed his complaint more than 90 days after his receipt of a right-to-sue letter from the EEOC.

Under the statute of limitations applicable to his Title VII and ADEA claims, Petitioner was required to file a complaint within 90 days after receiving notice of the EEOC's final decision. *See* 42 U.S.C. § 2000(e)-5(f)(1) and 29 U.S.C. § 626(e). The EEOC issued and mailed its right-to-sue letter to Petitioner by certified mail on July 1, 1996. After extensive discovery and argument on the issue, the District Court and

the Second Circuit agreed that Petitioner had received the right-to-sue letter on July 6, 1996. His deadline for filing a complaint was 90 days later, on October 4, 1996. However, Petitioner did not file his complaint until October 7, 1996, the 93rd day, and his Title VII and ADEA claims were therefore time-barred.

In reaching this determination, the courts below followed the ruling of this Court in *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984). *Baldwin* held that a *pro se* litigant who failed to file her Title VII complaint until the 96th day after receiving her right-to-sue notice from the EEOC was time-barred. This Court noted that there were no compelling reasons to toll the statute of limitations and that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.*

The Second Circuit's determination that Petitioner's Title VII and ADEA claims were barred by the 90-day statute of limitations is consistent with the holdings of several other circuit courts, as well as *Baldwin*. *See, e.g.*, *Rice v. New England College*, 676 F.2d 9, 11 (1st Cir. 1982) ("[i]n the absence of a recognized equitable consideration, the court cannot extend the limitations period by even one day"); *McCrary v. Corry Manufacturing Corp.*, 61 F.3d 224, 227-29 (3d Cir. 1995) (affirming dismissal of untimely ADEA claim as subject to 90-day statute of limitations which is not tolled by plaintiff's request for reconsideration made to EEOC during 90-day period); *Luckett v. Rent-A-Center*, 53 F.3d 871, 873 (7th Cir. 1995) (affirming dismissal of Title VII suit as time-barred; equitable tolling of limitations period

does not protect party who omits ordinary precautions); and *Littell v. Aid Ass'n. for Lutherans*, 62 F.3d 257, 259 (8th Cir. 1995) (affirming dismissal of claim because failure to file ADEA claim within 90 days after receipt of EEOC right-to-sue letter renders action untimely).

In this case, as in *Baldwin*, the Petitioner failed to file a discrimination complaint within the prescribed time period. The consequence of the failure to file an action within a period prescribed by the statute of limitations is dismissal of the case, and equitable relief from that consequence is to be afforded "only sparingly." *See Baldwin, supra*, at 152. *See also Irwin v. Dep't. of Veteran Affairs*, 498 U.S. 89, 96 (1990) (although Title VII statute of limitations is subject to equitable tolling, such equitable relief should not be afforded in case of mere neglect of 90-day deadline). In the present case, the District Court and the Court of Appeals concurred that no cause whatsoever had been shown for equitable tolling of the statute of limitations in this case.

2. Petitioner's Section 1981 Claim Was Properly Dismissed

The Court of Appeals correctly affirmed the District Court's dismissal of Petitioner's 42 U.S.C. § 1981 claim because Petitioner failed to rebut Respondent's substantial showing of a non-discriminatory reason for his discharge.

In a disparate treatment employment discrimination case brought under Section 1981, the three-step burden shifting analysis developed in *Burdine* and *McDonnell Douglas* is used: (1) the employee has the initial burden of establishing a prima facie case of unlawful discrimination; (2) if the employee meets that burden, the burden of production – but not persuasion – shifts to the employer to articulate a legitimate, non-discriminatory reason for the employee's

discharge; and (3) if the employer does so, the burden is then on the employee to show that the employer's stated reason was merely a pretext for discrimination. *Texas Department of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Petitioner retained the ultimate burden of proof to show unlawful discrimination. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000) ("[a]lthough intermediate evidentiary burdens shift back and forth under this framework, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff"). The District Court found, and the Second Circuit agreed, that Petitioner failed to meet that burden.

The District Court dismissed, and the Second Circuit correctly affirmed, Petitioner's Section 1981 claim because Respondent demonstrated a legitimate non-discriminatory reason for discharging Petitioner – poor performance – and Petitioner made no showing that Respondent's reasons were false or pretextual. Pet. App. 28. Indeed, Petitioner offered no basis for disbelieving TBTA's reasons; rather Petitioner admitted that his employment was terminated because of poor performance and not due to discrimination. *See* Deposition of Mukand Aneja, March 20, 1997, pp. 84, 94, 95 (Exhibit 25 to Declaration of Andrew Dansicker in Support of Defendant's Motion for Summary Judgment).

The lower court's decision does not contravene any decision of this Court or any other federal courts of appeal and, thus, does not warrant this Court's review. *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Texas Dep't. of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Lynch v. Belden and Co., Inc.*, 882 F.2d 262 (7th Cir. 1989); *Roxas v. Presentation College*, 90 F.3d 310 (8th Cir. 1996).

3. Petitioner's FLSA Claim Was Properly Dismissed as He Was An Exempt Employee

The Court of Appeals correctly determined that Petitioner's claim under the FLSA was properly dismissed. The Second Circuit examined the facts *de novo*, applied the proper legal standards for summary judgment, and concluded on the merits that, because Petitioner was an exempt employee under the FLSA standards, his claim was properly dismissed. *See* Pet. App. 19-24.

The FLSA provides that covered employees who work more than 40 hours per week must be compensated "at a rate not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(2). However, Congress expressly exempted from the FLSA's overtime provisions persons employed in a *bona fide* executive, administrative or professional capacity. 29 U.S.C. § 213(a)(1). As a Facility Engineer for the TBTA, Petitioner was employed in a *bona fide* professional capacity and, therefore, he was exempt from the provisions of section 207. *Id.*

The regulations prescribe a three-prong test to determine whether an individual, like Petitioner, is employed in a *bona fide* professional capacity for purposes of section 213. Specifically, employees: (i) who are compensated on a salary or fee basis at a rate of at least $250 per week;[2] (ii) whose "primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning

2. Employees are considered to be paid "on a salary basis" if, like Petitioner: (i) they are paid on a weekly or less frequent basis a predetermined amount constituting all or part of their compensation; and (ii) such payment is not subject to reduction because of variations in the quantity or quality of their work. 29 C.F.R. § 541.118.

customarily acquired by a prolonged course of specialized intellectual instruction and study . . ."; and (iii) whose duties require "the consistent exercise of discretion and judgment, . . ." are deemed to be employed in *bona fide* professional capacities for purposes of that section. 29 C.F.R. § 541.3(a)(1); 29 C.F.R. § 541.3(e); *Rutlin v. Prime Succession, Inc.*, 220 F.3d 737 (6th Cir. 2000); *Freeman v. National Broadcasting Co., Inc.*, 80 F.3d 78 (2d Cir. 1996).

Petitioner's position as a Facility Engineer at the TBTA meets all three of the above-outlined requirements. Petitioner's $68,000 salary was paid to him in bi-weekly increments at a gross, pre-tax rate of $2,608.22, which after taxes and other applicable deductions equaled approximately $1,900. This salary satisfies the minimum $250 per week salary prong of the professional capacity test. 29 C.F.R. § 541.3(e); 29 C.F.R. § 541.118.

As for the "duties" test, the regulations explicitly identify Petitioner's profession – engineering – as one which meets the requirement for a prolonged course of specialized intellectual instruction and study. 29 C.F.R. § 541.301(e)(1). Petitioner's primary duties also satisfied the discretion and judgment prong of the professional capacity test because, as Facility Engineer, he was explicitly required to exercise independent judgment. 29 C.F.R. § 541.3(e).

The Second Circuit accurately concluded that, as a highly-paid Facility Engineer, Petitioner was an exempt professional under the FLSA. This conclusion does not contravene any decision of this Court and is consistent with other Courts of Appeals decisions. *See, e.g., Balgowan v. State of New Jersey*, 115 F.3d 214, 219 (3d Cir. 1997) (engineers qualify for professional exemption under the

FLSA); *Boykin v. Boeing Co.*, 128 F.3d 1279, 1282 (9th Cir. 1997) (salaried engineers exempt from overtime pay provisions of the FLSA). *See also Dingwall v. Friedman Fisher Assoc., P.C.*, 3 F. Supp. 2d 215, 219 (N.D.N.Y. 1998) (design engineer with associates degree in electrical technology whose work required both advanced knowledge in engineering and exercise of judgment satisfied duties test required for section 213 exemption); *Molina v. Sea Land Services, Inc.*, 2 F. Supp. 2d 185, 189 n.9 (D. P.R. 1998) (crane port engineer responsible for crane operation and paid annual salary of approximately $70,000 deemed to have satisfied prima facie the required criteria under "professional" as to salary and discretionary judgment); *Leslie v. Ingalls Shipbuilding, Inc.*, 899 F. Supp. 1578, 1582 (S.D. Miss. 1995) (engineering specialist exempt from overtime pay under section 213 of the FLSA because job was "professional in nature" – job qualifications included a bachelor's degree and engineering experience, duties included carrying out of engineering projects, and annual salary equaled $63,489.60).

The Court of Appeals also rejected Petitioner's retaliation claim because it failed to satisfy the requirements of the FLSA's retaliation provisions, citing 29 U.S.C. § 215(a)(3) and *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993). The Second Circuit concluded its opinion with a determination that, contrary to Petitioner's claims, there was no indication that the District Court's judgment failed to comply with due process.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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Supreme Court, U.S.
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(3)

No. 02-880

In The

Supreme Court of the United States

Mukand Aneja
Petitioner,

V.

Triborough Bridge and Tunnel Authority
Respondent(s)

On Petition for A Writ Of Certiorari To
United States Appeal Court Second Circuit

REPLY TO BRIEF IN OPPOSITION

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17 pp

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REVISION TO PETITION PAGES--- 4 pages(6.7.9, & App17)

This is Petitioner's response to Respondents brief in opposition. Respondent's highly skilled professional litigation counsel is trying to mislead the court. Due to page limitation Petitioner will provide response relevant to important items for Court's review and consideration as follows:

A1). Reeves vs. Sanderson Plumbing Products Inc., 530 US. 133,143 (2000)—No. 99-536 Discrimination.
The Supreme Court ruled unanimously that it is not necessary—as some appeals courts have held—for an employee to provide specific evidence pinpointing discrimination as the real reason for being fired.

It may be enough just to show **"some"** evidence of age bias and to cast doubt on the employer's given reason for the dismissal. Then it's up to a jury to decide whether discrimination was a key factor in the firing.

The company claimed Reeves was fired for keeping shoddy attendance records of the staff he supervised.

Although a jury ruled in Reeves' favor, a court of appeals reversed the jury's decision, noting that the age-related comments were not made in context of Reeve's dismissal.

The Supreme Court disagreed with the appeals court and not only reinstated the jury verdict—but also laid some ground rules on what it takes for an age bias case to merit a jury trial.

The Supreme Court ruled that an employee who claims age bias is entitled to a trial by jury depends on two factors: the quantity and quality of evidence that the employer treated the employee adversely and whether a jury might reasonably conclude that the employer's given reason for the dismissal was false.

A2) . QUALITY AND QUANTITY OF EVIDENCE SUBMITTED TO DISTRICT COURT

Plaintiff submitted counter statement in response to Defendant's undisputed material fact (23 pages).Plaintiff also submitted 28 pages of plaintiff's statement of undisputed material fact. Also,2 ½ inches thick voluminous material (as Appendix) had been submitted to the court (96 Civ.7598) containing quantity and quality of material.
Second District Court Judge granted summary judgment on 11/2/99 (96 civ. 7598) **prior to Reeves decision.**

A3) . QUALITY AND QUANTITY OF EVIDENCE SUBMITTED TO APPELLATE COURT

. Plaintiff-Appellant, in his reply has submitted thirty (30) paragraphs of factual statements backed by deposition/documents (132 pages) which deal with quality and quantity of evidence as Supreme Court established in Reeves vs. Sanderson Plumbing 530 US 133 (2000). Unfortunately, Appellate court did not review evidence.

Only a few facts from the above document are being cited to illustrate quality and quantity of material facts.

4. Appellant Mr. Aneja was an excellent employee. This was admitted by defendant (A-71) "although his technical skills are excellent --" - Plaintiff was unaware of any complaints concerning his work performance (A-98). Plaintiff can prove that he had exceeded or met the job description as specified by A-23.

4A Plaintiff as a Facility Engineer, supervised two managers (Gadi Amit—Construction Mgr. And Nick Popescu—Project Manager), one secretary and 9 construction and design contractors. Also, two Licensed Professional resident engineers and a staff of 6 employed by consultant. Only two individuals (Gadi Amit and Nick Popescu) were deposed. My secretary and two contractors and two Professional Licensed Engineers are expected to appear in expected jury trial as friendly witnesses and they have not been deposed. Other TBTA Dept. personnel were deposed, and except for a few individuals, who were coerced by Stan Vonasek to provide negative comments, remained honest. A few of the depositions are summarized to give a sample of TBTA predetermined management action, once Stan Vonasek decided to get rid of Plaintiff. (P Exh.1—135). Plaintiff had submitted 135 exhibits labeled as P.Exh. to U.S.District Court and defendant on 11/30/98. However, only a few pertinent exhibits are attached herewith, for easy retrieval.

Footnote1: Plaintiff had submitted 135 exhibits labeled as P.Exh. to U.S. District Court and defendant on 11/30/98. However, only a few pertinent exhibits are attached, herewith for easy retrieval. Footnote 2. All items identified by (A) are

listed in defendant-appellee's appendix pagination have been identified by enclosed table of appendix (pg 7-9)

4B. Gadi Amit never complained about Plaintiff while Aneja was at TBTA. See P.Exh.104 page 80-81.

4C. Nick Popescu also never complained about Plaintiff while Aneja was at TBTA. See P. exh. 105 pages 44,45,46.

4D. Stan Vonasek admitted (P.Exh.103 pg.166) that he was soliciting negative comments against Aneja.

4E. Defendant Appendix A—89&90 states that contractors complained about Aneja. That is not factual. No complaint was received and/or documented.

4F. Asst. Direct. Of the Design Group, Mr. Segal stated that he had no problem with Aneja. He also stated that Aneja had plans to save millions of dollars for TBTA (P Exh.106)

4G. Another important officer of the TBTA, an EEOC officer, Mr. Smith stated that he had no problem with Aneja's communication and/or management skills. He tried to get Plaintiff reinstated but did not succeed. (P exh.114) Mr. Smith discussed with his supervisor (Mike Ascher—President of TBTA) Mr. Ascher told him that TBTA should have given training to Aneja in early March on how to do business the TBTA way.

4I. Stan Vonasek never followed "so called" corrective action, due to the fraudulent nature of his "performance review of Aneja." This evaluation was not reviewed by his

supervisor and the Personnel Dept. as required by TBTA's procedures, goals and mission statement.

5. Plaintiff claims (A-97) "in June 1994, during a staff meeting Stan persistently asked me, three or four times, the year of my birth, when I finally told him it was 1937, he responded: " I hire all kinds of people..." (See also A-239). From this evidence a reasonable inference could be drawn in favor of plaintiff's allegations of age discrimination and thus dismissal on this count is not proper.

5a. TBTA admits that Mr. Vonasek asked Aneja's age (See Defendant's undisputed Fact) submitted in response to motion for summary judgment on 11/30/98). However, Mr. Vonasek denies asking my age and having any knowledge of my exact age as of 9/3/97 (see P.Exh.103 deposition dated Sept, 3,1997 Page 97 & 98), which is not true.. Mr. Vonasek has also seen Plaintiff's age and national origin based complaint, filed in 1996.

5d. Once Stan Vonasek discovered my age, Mr. Vonasek was not appreciative of my aggressiveness in resolving complex facility problems, which I inherited from Tom Hynes, previous facility engineer. In fact, he commented, that I was good at taking over the reigns at the Rockaway's (A-88). Even though I have never seen this document while I was at TBTA, I showed M. Vonasek that Aneja, as Facility Engineer, could save TBTA significant sums of money, by not going to Marracap construction, but rather to SN Tannor/Daskell (P.exh.7 to 19) and still do timely construction with approved change order. However, Stan did

not appreciate because he wanted Marracap to do the job to make an exorbitant profit.

6a. Plaintiff can and will prove that he inherited most of the job-related problems created by the previous Facility Engineer at Rockaway Bridges (Thomas Hynes), whose job plaintiff took. (P exh 23,34,47,57,58,117,etc.) However, Mr. Thomas Hynes was neither disciplined nor written up. Mr.Hynes is older than Aneja but happens to be Caucasion and was given all kinds of favoritism as compared to Plaintiff, who is of Indian origin. Mr. Hynes has been the subject of investigation by the Inspector General as a result of complaints on the White Stone Bridge. Mr.Hynes also mismanaged facility engineering responsibilities at White Stone Bridge. He was removed and assigned to General Projects, whereas Aneja was given a performance evaluation in September 1994 with 45 days to improve, obviously in keeping with Stan's fraudulent intentions.of getting ride of Aneja. Vonasek's supervisor and Personnel Dept. did not review this evaluation. There was no written consent (A-61). No action was taken by Mr. Vonasek in trying to improve what he alleged was Aneja's poor performance, since 9/19/94.

6b. Also, in closed-door meeting on September 19, 1994, Mr. Vonasek made comments regarding foreign accent and writing skills. Aneja, Amit & Popescu are foreign born. Mr. Popescu, still working for Vonasek denies having this meeting; however, entries in his diary indicate that that meeting took place on Sept.19,1994, and writing skills, etc. which were discussed were all documented (P.Exh—88) The third person who attended this meeting, Mr. Gadi Amit, testified when asked about this meeting. "Do you recall that

Stan Vonasek told us in a closed door meeting on September 19,1994, you people are foreign born, so you have to sharpen your communication skills." Mr. Gadi replied, "I don't recall, but he could have." (P exh.104) Also, Aneja's note in his diary mentions that meeting (P Exh 87).

8. Mr. Vonasek has told untruths 11 times for money and other matters, as documented by deposition and/or letters written to others by Vonasek. Let jury decide..

8a TBTA has an extensive Training Program, particularly if a candidate is subject of performance evaluation (P Exh 98). No such training was provided, as was offered to other Facility Engineers (P Exh.99)

8b. Mr. Vonasek mislead Aneja by stating that his informal performance evaluation of Aneja on 9/8/94 was going to stay in the Engineering and Construction Dept. only.

8c. Vonasek supervisor (Leland Caldwell) never reviewed &/or signed the evaluation sheet

8d. No individual from the Personnel Dept.either reviewed &/or signed the sheet due to the fraudulent intention of Vonasek's evaluation.

8e Edna Williams testified that, according to procedure, Mr. smith, EEOC officer, must have also seen and reviewed it prior to signing it. This is not factual since Smith did not know per his deposition and didn't sign.

8f TBTA mislead EEOC by not revealing that each department did their own hiring and firing.(see Caldwell

deposition (P Exh. 102)) Review of Stan Vonasek Department indicates that as of Nov.28,1994, he had 36 employees, out of which 5 were Asian, including 3 who were Indian & 2 employees were 50 years old and only one employee 61 years old. In terms of %, 2.8% above 60, 5.6% above 50 (EEOC was told that it was 25%), and 17% above 40.) In 1998/1999 thru 2003, there was no Facility Engineer and/or Manager of a minority group employed by TBTA.

8i. Stan Vonasek manufactured and solicited negative evidence against plaintiff once he found my age and gave untimely, untrue and fraudulent evaluation. Stan Vonasek finally replaced Aneja with a much younger FacilityEngineer, Moshe Adrian—white DOB 6/4/54 –17 years younger. Court should note that this indivdual is in the protective age group. However, NY Times reported that the Supreme Court has ruled "The fact that one person in the protected class has lost out to another person in the protected class is irrelevant, so long as he has lost out because of his age,According to **Hon Justice Scalia,** "the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class."

Appellate judges based their decision without considering Plaintiff's factual information, which is submitted above.

APPELLATE JUDGES IGNORED US GOVT POSTAL CARRIER AFFIDAVITT

Plaintiff brought to the attention of appeal court that a Letter Brief (10 pages) was missing in the court record. Court requested me to file a motion to include exhibits, which I did on 6/24/02 (see App.3). Plaintiff also submitted motion for Petition for reconsideration

based on new documented evidence on 6/13/02, viz., affidavit from U.S.Govt. Postal clerk, who has been employed with the U.S.Govt. Postal Service for 20 years, stating that he delivered EEOC document between 7/8/1996 and 7/13/1996. Court accepted the AFFIDAVIT but denied hearing on 7/12/96.

B) **PERFORMANCE**

EMPLOYMENT RELATED TO BURNS AND ROE (18YEARS+)(ANDREW DANSICKER ESQ.DECLARATION IS FALSE)

Burns and Roe maintained that due to downturn in business I was laid off. Aneja had an excellent record in Management, Leader ship, etc.. Aneja had supervised 40 engineers for many years on DOE-CLINCH RIVER BREEDER REACTOR PROJECT located in Tennessee. Also managed $150million DOD-COE ,BZ Chemical DEMILITARIZATION PROJECT LOCATED IN ARKANSAS., supervising 26 engineers and 160 construction workers , without any complaint from any employee, contractor, or Govt. official, on Communication, Management or Technical skills. Aneja also had excellent working relations with representatives of GE, WESTING-HOUSE, ATOMIC INTERNATIONAL, TVA, STONE & WEBSTER, DEPT. OF ENERGY ..

Aneja has received commendations from Dept. of Energy which state," ---performed in an exceptional, effective and cooperative manner—" (P. exh. 91), Aneja has also received commendations from Department of Defense/Corps of Engineer ,"—I would like to take this opportunity to personally express my sincere appreciation for

the outstanding effort you give for several years to the BZ Demilitarization Project(P.exh.92); MTA-NYCT ,"—In closing let me again offer my congratulations to you for a job well done. I look forward to working with you in the future to finish the flushing project" signed by J..Forman, Senior Vice President, Capital Program Management (P.exh.93):; Construction Progress for quality product (P.exh.93).

C. THERE ARE MATERIAL ISSUES OF FACT IN DISPUTE MAKING SUMMARY JUDGMENT INAPPROPRIATE

1. Since his first day in District Court, Plaintiff has been stating that he received EEOC decision on 7/8/96 (see App. 52—66).
2. Pro se office advised Plaintiff on 10/4/96 that he had filed in a timely manner. Appellate Judges have assumed, mistakenly, that Plaintiff went to District Court clerk's office on 10/7/96.
3. Plaintiff never stated and/or admitted that he received letter on 7/6/96. It was Defendant's Counsel who mislead District Judge, see Petition for Writ of Certiorari App 39.
4. **APPELLATE JUDGES IGNORED US GOVT POSTAL CARRIER AFFIDAVIT.**

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mulcahy Angel Date 2/20/03

However, Appeal Court did not verify but that plaintiff signed the complaint on 10/4/96 & went to Prose office on 10/4/96 & not on 10/7/96 (*See* App. 70) as assumed by Appeal Court. Furthermore Appeal court ignored the fact that defendant was ordered on 4/29/97 (*See* App. 94) to file Motion to establish case was filed out of time but failed to follow D.C. order (see Transcript from App. 52)

Furthermore, Appeal Court accepted notarize letter from U.S. Gov't Postal Clerk stating that he delivered EEOC letter between 7/8/96 to 7/12/96. Thus complaint can't be out of time and per summary standard case should have been remanded to D.C. for jury trial, but failed to do so, only Supreme Court has the supervisory power to direct U.S. Court of Appeals for Second Circuit.

The details are provided herewith as follows,

THERE ARE MATERIAL ISSUES OF FACT IN DISPUTE MAKING SUMMARY JUDGMENT INAPPROPRIATE

A court may grant summary Judgment under Fed. R. Civ. P.56© only when "there is no genuine issue as to any material fact and ...the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Where, as here, the nonmovant bears the ultimate burden to prove at trial that the

defendant misinformed Plaintiff (regarding his alleged performance evaluation) see Texas Department of Community Affairs v. Burdine, 450 US. At 253, 101 S. Ct. at 1093, he may defeat the summary judgment motion by procuring sufficient specific facts to establish that there is a genuine issue of material fact for trial. Celotex Corp. v. Catrett. 477 U.S. 317, 322, 106 S. Ct. 2548, 2553, (1, L. Ed. 2d. 265(1986).

In addition, in ruling on a motion for summary judgment, a court must, "resolve all ambiguities and draw all reasonable inferences in favor of the party defending against the motion."

Eastway Construction Corp. v. City of New York. 762 F.2d 243, 249(2d Cir, 1985), cert. denied. Finally, summary judgment is ordinarily inappropriate where intent and state of mind are at issue. Meiri v. Dacon. 759 F.2d at 998; Patrick v. LeFevre, 745 F.2d 153, 159 (2d Cir.1984). See Montana v. First Federal S& L of Rochester. 869 F. 2D 100(2d Cir. 1989).

In this particular case, performance evaluation was conducted fraudulently and was supposed to be kept in the department & reevaluated, but Aneja was terminated as a pretext due to the newly discovered age information in conjunction with his national origin status

on 10/4/96 & prose office advised on 10/4/96, it was filed timely and plaintiff has to bring required filing fee on 10/7. Thirdly, First District Judge, Hon. Judge Patterson ordered Defendant to file motion by 5/29/97 (See App. 52 & App. 94) to affirm that Plaintiff filed complaint with in 90 days, but Defendant failed to file such motion. Fourthly, at Summary Judgment hearing, (*See* App. 32), Plaintiff clearly informed second judge, Hon. District Court Judge Hellerstein that Plaintiff received post office notice on 7/5 due to 4th of July weekend; post office did not deliver until July 8, 1996. Hon. Judge assumed without any verification without any verification contrary to summary judgment standard, that Plaintiff received EEOC determined on 7/6/96

In addition, plaintiff submits that there is basis for an equitable tolling. The 90-day rule should be considered in the nature of a statute of limitations subject to waiver, estoppel or equitable tolling. Johnson v. AL Tech Specialties Steel Corp. 731 F. 2d 143 (2d cir. 1984). In Tolliver v. Sullivan County, 841 F. 2d 41 (2 d cir. 1988), plaintiff had the complaint to the pro se clerk prior to the 90- day limitation period expiring on the notice of right to sue. However, the complaint was not filed until the expiration of 90 days i.e. on 10/7. The court held that as long as the initial complaint was received prior to the 90-day limitation period, the statute should be equitably tolled. Tolliver, supra, at 42. See also, Brown v. Enzyme Development Division of Biddle Sawyer Corp., 780 F. Supp. 1025(S.D.N.Y. 1992). In the instant case, plaintiff went to the pro se office with signed complaint on 10/4/99 and was advised that I filed

 1 REV.

USPS Receipt

Article No: 2 2 8 3 1 8 5 4 4
Today's Date: 7/5/96
Sender's Name: [illegible]

Letter, Certified

Name, address, received by signature: [illegible]

Delivered by: Illegible (1/7/97) 1R
Date: